No. 15-5059

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WELLS FARGO & COMPANY,

Plaintiff-Appellee

v.

UNITED STATES,

Defendant-Appellant

ON APPEAL FROM THE ORDER OF THE
UNITED STATES COURT OF FEDERAL CLAIMS
No. 11-808-T, Judge Nancy Firestone

CORRECTED BRIEF FOR THE APPELLANT

CAROLINE D. CIRAOLO
Acting Assistant Attorney General

DIANA L. ERBSEN
Deputy Assistant Attorney General

GILBERT S. ROTHENBERG (202) 514-3361
JONATHAN S. COHEN (202) 514-2970
ELLEN PAGE DELSOLE (202) 514-8128
Attorneys, Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

May 13, 2015

TABLE OF CONTENTS

Page

Page(s)

TABLE OF AUTHORITIES

Cases:

Cases (cont'd): **Page(s)**

Cases (cont'd): Page(s)

Cases (cont'd): **Page(s)**

Federal Statutes:

Federal Statutes (cont'd): **Page(s)**

Internal Revenue Code of 1986 (26 U.S.C.):

Federal Statutes (cont'd): **Page(s)**

State Statutes:

Miscellaneous: **Page(s)**

Miscellaneous (cont'd): **Page(s)**

STATEMENT OF RELATED CASES

No appeal in (or from) the same civil action or proceeding in the Court of Federal Claims has been before this or any other appellate court. We note, however, that when the Government petitioned for permission to proceed with this interlocutory appeal, the case originally was assigned docket number 15-103. When this Court granted the petition for permission to appeal, the case was given its current docket number, 15-5059.

We are not aware of any case pending in this or any other court that will directly affect this Court's decision in this case. We are aware, however, of two cases pending in the United States Court of Federal Claims that involve interest-netting issues with respect to merged entities, and that therefore may be affected by the outcome of this appeal, *viz.*, *Ford Motor Co. v. United States* (Fed. Cl. - No. 14-458-T), and *Texaco v. United States* (Fed. Cl. - No. 00-195-T).

We also note that the tax liabilities of the plaintiff-appellee for some years are the subject of ongoing litigation, and the ultimate determination of plaintiff-appellee's tax liabilities for certain tax years is likely to affect the amounts of the underpayments or overpayments to

be netted. *E.g.*, *Wells Fargo & Company v. United States* (D. Minn. - No. 0:09-cv-02764-PJS-TNL). This may affect the amount of any refund in this case. This other litigation, however, does not affect the resolution of the legal issue presented in this interlocutory appeal. Additionally, the outcome of this appeal addressing interest netting will not affect resolution of other ongoing litigation involving the plaintiff-appellee's tax liability for certain years.

GLOSSARY

Acronym	*Definition*
CCA	Chief Counsel Advice
CFC	Court of Federal Claims
EIN	Employer identification number
FSA	Field Service Advice
IRS	Internal Revenue Service
TIN	Taxpayer Identification Number

JURISDICTIONAL STATEMENT

Beginning in 2009, Wells Fargo & Company ("Wells Fargo") filed numerous administrative claims with the Internal Revenue Service ("IRS") involving interest. (A7.) [1] Most of the claims involved interest-netting claims under Internal Revenue Code ("I.R.C." or "the Code") § 6621(d) (26 U.S.C.). (A7, 37-287, A291-522, A673-74.) The IRS did not act on many of the claims, and Wells Fargo subsequently filed this suit. (A7-8.) The CFC had jurisdiction under I.R.C. §§ 6601(f), 6611, 6621(d), and 7422 and 28 U.S.C. §§ 1346(a), 1491, 2401, and 2501.[2]

Following cross-motions for partial summary judgment, the CFC, in a June 27, 2014 opinion and order, granted Wells Fargo's motion for partial summary judgment and denied the Government's motion. (A1917-44.) On the Government's motion (A1945-54), the CFC certified that opinion and order for immediate appeal under 28 U.S.C. § 1292(d)

---

[1] "A" references are to the separately bound record appendix.

[2] The Government moved to dismiss some claims for lack of jurisdiction because they had been asserted in other pending litigation (*see* A8; 28 U.S.C. § 1500). The parties stipulated to a partial dismissal, dismissing claims as to which the Government had challenged jurisdiction. (A288-90.) The amended complaint omitted those claims. (A291-522.)

(A1995-96), and issued an amended opinion reflecting that certification (A1-28). The Government then timely petitioned this Court for permission to bring this interlocutory appeal under 28 U.S.C. § 1292(d)(2) and Fed. R. App. P. 5. On February 24, 2015, this Court granted the petition. (A1997-99.)

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 15-5059

WELLS FARGO & COMPANY,

Plaintiff-Appellee

v.

UNITED STATES,

Defendant-Appellant

ON APPEAL FROM THE ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS No. 11-808-T, Judge Nancy Firestone

---

CORRECTED BRIEF FOR THE APPELLANT

STATEMENT OF THE ISSUES

1. Whether corporate entities, unrelated to each other at the time that their respective tax underpayment and tax overpayment were made, but which later merged under state law, are the "same taxpayer" for purposes of interest netting under I.R.C. § 6621(d).

2. Whether corporate entities are the "same taxpayer" for purposes of interest netting under I.R.C. § 6621(d), when the tax

overpayment was made by the acquired corporation before the entities merged, and the underpayment was made by the surviving corporation after the merger.

STATEMENT OF THE CASE

A. Procedural History

Wells Fargo filed numerous administrative claims asserting that it was entitled to recover interest, on its own behalf and as successor to other banking institutions. (A7, 673-74.) In its amended complaint, Wells Fargo sought to recover over $307 million of interest in connection with 64 of those interest claims, primarily based on interest netting under I.R.C. § 6621(d).[3] (A8, 291-522.)

To expedite resolution of the interest-netting claims, the parties agreed to divide the claims into three test scenarios, reflecting discrete fact patterns that repeatedly appeared in the netting claims, and to have the CFC decide those test scenarios as a means for resolving a majority of the claims. (A8-9, 678-82.) The Government conceded that

[3] Unless otherwise indicated, section references herein are to the current version of the Internal Revenue Code of 1986, 26 U.S.C. as in effect today.

netting would be permitted in one of the test situations (A1625); the parties disputed, in cross-motions for partial summary judgment, whether netting was permissible in the other two. (A1524-1673.) In an opinion and order granting partial summary judgment for Wells Fargo, the CFC held that netting was permissible in both contested test situations. (A1-28, 1917-44.)

The Government moved in the CFC for certification of that opinion and order for immediate interlocutory appeal (A1945-54), and the CFC granted the motion. (A28, 1995-96.) The Government then petitioned this Court for permission to appeal, which was granted. (A1997-99.)

B. Factual Background

1. Introduction to the statutory framework

Since 1986, the Internal Revenue Code has provided that corporate taxpayers must pay interest on underpayments at a higher rate than the IRS must pay on overpayments. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1511(a), 100 Stat. 2085, 2744. To minimize the possibility that a taxpayer could end up owing the IRS a net liability attributable to interest for periods in which the taxpayer had

equivalent overlapping overpayments and underpayments, Congress enacted I.R.C. § 6621(d), which provides that, to the extent underpayment interest is payable and overpayment interest is allowable "on equivalent underpayments and overpayments by the same taxpayer[,] . . . the net rate of interest under this section on such amounts shall be zero for such period." Whether Wells Fargo can recover on its interest-netting claims in this appeal turns on whether, and under what circumstances, merged entities constitute the "same taxpayer."

2. The relevant mergers

The relevant facts are undisputed. (A4.) Wells Fargo's interest-netting claims here arise from seven mergers leading to the formation of Wells Fargo as it currently exists. (A4, 661.) [4] These mergers can be

[4] The various mergers included mergers under the state laws of Delaware, New Jersey, North Carolina, Pennsylvania, and Virginia. (A661-72.) In each state, by operation of law, the surviving corporation acquired the assets and assumed the liabilities of the acquired entity, which ceased to exist. (*Id.*)

divided into two groups: the Wells Fargo mergers and the Wachovia/First Union mergers. (A4, 661.)[5]

The Wells Fargo group of mergers is small. In 1998, Norwest Corporation ("Norwest") acquired the entity then known as Wells Fargo & Company ("Old Wells Fargo") through a forward triangular merger, in a transaction falling within I.R.C. §§ 368(a)(1)(A) and 368(a)(2)(D).[6] (A660-62.) Old Wells Fargo merged into WFC Holdings, Corp. ("WFC"), a subsidiary of Norwest organized for purposes of the merger. (*Id.*) Norwest and its subsidiary WFC survived the merger, while Old Wells

---

[5] A graphical depiction of the mergers appears at A1549.

[6] Dispositions of stock for cash and most exchanges of stock for other property are generally taxable events. *See* BORIS BITTKER & JAMES EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS, ¶12.01[1] (6th ed. 1998) (hereinafter BITTKER & EUSTICE). This general rule, however, is subject to exceptions that render certain exchanges nontaxable. As relevant here, the Code provides that certain corporate reorganizations are nontaxable events. *See* I.R.C. §§ 354-368; BITTKER & EUSTICE, ¶12.01[1]. The mergers here are reorganizations. *See* I.R.C. § 368(a)(1)(A) ("reorganization" includes a statutory merger (*i.e.*, merger under the controlling state statute)); § 368(a)(2)(D) (defining "reorganization" to include certain transactions involving subsidiaries); *see also* BITTKER & EUSTICE, ¶12.22[3] (explaining that § 368(a)(2)(D) covers a forward triangular merger, in which the acquired entity is merged (in a statutory merger) into a controlled subsidiary of the acquiring corporation).

Fargo's separate existence was terminated. (A662-63.) Norwest then changed its name to Wells Fargo & Company. (A663.)

The First Union/Wachovia group of mergers is more extensive. In 1996, First Union acquired First Fidelity Bancorporation ("Fidelity") through a forward triangular merger under I.R.C. §§ 368(a)(1)(A) and 368(a)(2)(D). (A665-66.) Fidelity merged into First Union Corporation of New Jersey ("FCNJ"), a subsidiary of First Union organized for purposes of the merger. (*Id.*) First Union and its wholly-owned subsidiary FCNJ survived the merger, and Fidelity's separate existence was terminated. (A666.) In 1998, FCNJ and First Union merged under I.R.C. § 368(a)(1)(A), with First Union surviving the merger and FCNJ ceasing to exist. (A667.).

Additionally, in 1997, First Union and Signet Banking Corporation ("Signet") merged under I.R.C. § 368(a)(1)(A). (A668-69.) First Union survived the merger, while Signet's separate existence was terminated. (A669.) In 1998, First Union and CoreStates Financial Corporation ("CoreStates") merged under I.R.C. § 368(a)(1)(A). (A669-71.) In 2001, First Union and Wachovia Corporation ("Old Wachovia") merged under I.R.C. § 368(a)(1)(A). (A671-72.) First Union survived

the merger, and Old Wachovia's separate existence was terminated. (A672.) First Union then changed its name to Wachovia Corporation, referred to herein as "New Wachovia." (A673.)

In 2008, Wells Fargo and New Wachovia merged under I.R.C. § 368(a)(1)(A). (A663-64.) Wells Fargo survived the merger, and New Wachovia's separate existence was terminated. (A664.)

3. The claims for interest

Wells Fargo, the surviving corporation, filed numerous administrative claims involving interest, on its own behalf and on behalf of other banking institutions to which it was the successor after the mergers. (A673-74.) These administrative claims for additional overpayment interest or a refund of underpayment interest primarily were based on interest netting under I.R.C. § 6621(d). (*Id.*). In this action, Wells Fargo pursued its refund claims that had not been granted administratively. (*Id).*[7]

[7] As the CFC noted (A7 n.6), the IRS allowed some of Wells Fargo's claims, including some under I.R.C. § 6621(d), which are not at issue in this case. (*Id.*; *see also* A1743-81.) To the extent some allowed claims were similar to those in dispute here, they were allowed before this Court's opinion in *Energy East v. United States*, 645 F.3d 1358 (Fed. Cir. 2011), which, as explained *infra* (pp. 27-31), provided

(continued…)

4. Proceedings in the CFC

To speed resolution of the interest-netting claims, the parties asked the CFC to consider three test situations, to be addressed in cross-motions for partial summary judgment.[8]

a. The test situations

"Situation 1" addressed whether a pre-merger acquiring entity is the same taxpayer as a pre-merger acquired entity. (A8.) As the test case for that situation, the parties agreed the court should consider whether netting would be allowed between (1) a pre-merger underpayment made on the 1999 account of First Union (taxpayer

---

(…continued)
significant guidance on § 6621(d)'s application. (*See* A1782-84.) The fact that the IRS, without the guidance of *Energy East*, previously may have allowed similar claims to the ones presented here, however, provides no support for Wells Fargo's contention that this Court now should hold netting is permissible in the contested situations presented in this litigation.

[8] The test situations are contained within claims 1B and 3P in the amended complaint. (A307-10, 434-38, 1631-32.) We have set forth the pertinent facts regarding each test situation in simplified form here; further factual detail can be found in our summary judgment brief (A1632-34), and in the stipulation of facts (A678-81).

identification number ("TIN"): 56-0898180),[9] the acquiring corporation in a later 2001 merger, and (2) a pre-merger overpayment made on the 1993 income tax account of Old Wachovia (TIN: 56-1473727), the acquired corporation in that later merger. (A679-80.) In this example, it was undisputed that First Union's underpayment and Old Wachovia's overpayment both were made before they merged. (*Id.*; A8.)

"Situation 2" involved a pre-merger overpayment by the acquiring corporation in a subsequent merger, and an underpayment made post-merger by the acquiring (and thus surviving) corporation. (A8.) In the test case for this scenario, the overpayment was made on the 1993 income-tax account of First Union, which later would be the acquiring corporation in subsequent mergers, and the underpayment was made on the 1999 income tax account of First Union, which by that time was the surviving corporation of intervening mergers. (A681-82.) The overpayment on First Union's 1993 income tax account (TIN: 56-0898180) and the underpayment on First Union's 1999 account (also

[9] The TIN for a corporate taxpayer is its employer identification number (EIN). For consistency with the CFC's opinion, we use the term TIN here.

TIN: 56-0898180) were separated by three intervening mergers (with First Fidelity, Signet, and CoreStates) in which First Union was the surviving entity. (*Id.*)

"Situation 3" addressed whether a pre-merger overpayment by the acquired entity could be netted against an underpayment of the post-merger acquiring entity, which was the surviving corporation. (A9, 680-81.) In the test case, the overpayment was made before the merger on the 1992 income-tax account of CoreStates (TIN: 23-1899716), the acquired corporation in the 1998 merger of CoreStates and First Union, after which CoreStates ceased to exist as a separate entity. (*Id.*) The tax underpayment was made after the merger on the 1999 income-tax account of First Union (TIN: 56-0898180), the acquiring corporation and surviving corporation after the merger. (*Id.*)

Absent interest netting between the merged entities on overlapping interest accruals, the interest rate on the underpayment on First Union's 1999 income-tax account would be higher than the interest rate on the overpayments for the other tax accounts in the test situations.

b. The cross-motions for partial summary judgment

Because I.R.C. § 6621(d) authorizes interest netting only by the "same taxpayer," the dispute centered on the meaning of "same taxpayer" in the context of a statutory merger. The Government conceded that, in Situation 2, the acquiring corporation and surviving corporation were the "same taxpayer" for purposes of § 6621(d), because the corporation making the overpayment and the corporation making the underpayment had the same TIN. In Situations 1 and 3, however, the Government maintained that the entities seeking to apply interest netting were not the "same taxpayer." Wells Fargo contended that they were.

In Situation 1, both Old Wachovia's overpayment and First Union's underpayment were made before they merged. The Government maintained (A1636-37) that this situation was governed by *Energy East v. United States*, 645 F.3d 1358, 1361 (Fed. Cir. 2011), in which this Court interpreted § 6621(d)'s statutory language as "provid[ing] an *identified* point in time at which the taxpayer must be the same, *i.e.* when the overpayments and underpayments are made." This precedent, the Government contended, compelled the conclusion

that, in Situation 1, First Union and Old Wachovia were not the "same taxpayer."

The Government further argued that the text of the statute made it clear that, for two entities to be the "same taxpayer," there had to be identity of the subject entities, at least in terms of certain relevant essentials. (A1638-1640.) Based on *Magma Power Co. v. United States*, 101 Fed. Cl. 562, 569 (2011), which held that having the same TIN was determinative of whether two entities were the same taxpayer, the Government urged that entities must have the same TIN to be able to net interest. (A1640-43.) Under this analysis, the Government conceded that netting was allowed in Situation 2, but argued that netting was not allowed in Situations 1 and 3.

Wells Fargo argued that the entities seeking interest netting in both Situations 1 and 3 were the "same taxpayer." In this regard, it relied on case law pre-dating the enactment of I.R.C. § 381 (which provides for certain tax attributes to transfer from one entity to another in corporate reorganizations, including mergers), urging that this case law established that the surviving corporation is a continuation of the acquired corporation. (A1526-57.) It contended that it followed from

such law, and from cases generally recognizing that the surviving entity succeeds to the assets and liabilities of the acquired entity, that all parties to a statutory merger are the "same taxpayer." (A1564-82.) Wells Fargo contended that I.R.C. § 381 did not preclude its reliance on the case law, because § 381's list of tax attributes that transfer to the surviving corporation after a merger (which do not include interest netting) is not exclusive. (A1581-86.) Wells Fargo further urged that interest is treated as tax under I.R.C. § 6601(e), and that, because a successor corporation is liable for the predecessor's tax and is entitled to the predecessor's refunds, the successor corporation likewise should inherit the right to interest netting. (A1682-85.) Wells Fargo also urged that allowing netting in Situations 1 and 3 was consistent with the IRS's practices in applying I.R.C. § 6402, which provides for offsetting certain payments. (A1602-03.) Finally, it cited informal IRS advice memoranda, some of which pre-dated *Energy East*, in support of its arguments. (A1602-08.)

c. The CFC's opinion

The CFC held that the entities in both Situation 1 and 3 were the "same taxpayer," and that netting was allowed. The CFC rejected the

Government's argument that § 6621(d) was a waiver of sovereign immunity that must be strictly construed. (A13 n.9.) It instead concluded that the legislative history revealed § 6621(d)'s remedial purpose, and it applied the canon of construction that remedial legislation should be construed broadly to benefit the taxpayer. (A12.)

The CFC agreed with Wells Fargo that, in a merger, the acquiring corporation becomes "one and the same" with the acquired corporation "by operation of law," and at that point "shares the history of both the acquired and acquiring entity." (A9-10.) Thus, the court accepted Wells Fargo's argument that "the term 'same taxpayer' includes both predecessors of the surviving corporation in a statutory merger, and that, as a result, the statute allows for interest netting regardless of whether the overlapping overpayments and underpayments involve corporations that were separate until the merger is carried out." (A3.)

The CFC characterized the Government's position, based on *Energy East* and *Magma*, as simply that entities making an overpayment and an underpayment are the "same taxpayer" only if they have the same TIN; the court rejected it. (A3, 9-13.) The court opined that *Energy East* and *Magma* were not "controlling" because

they addressed netting claims in the context of a consolidated corporate group, rather than a merger. The CFC viewed a merger as different because it caused the acquired and acquiring corporations to "become one and the same as the surviving corporation" "by operation of law," so that they thus "share a common history." (A14; *see also* A11, 16.)

The CFC rejected the Government's arguments that *Energy East* imposes a temporal requirement that the overpayments and underpayments must belong to the same taxpayer when they are made, and that, in Situation 1, First Union and Old Wachovia were then separate. The CFC treated *Energy East*'s analysis, in the context of acquisitions affecting a consolidated corporate group, as inapplicable because of the different legal consequences of a statutory merger. (A16-17.) The court stated that, because in a merger "the surviving corporation steps into the shoes of the acquired entity and the surviving corporation is liable retroactively for the tax payments of its predecessors, it does not matter when the initial payments were made." (*Id.*)

The CFC also declined to follow *Magma*, 101 Fed. Cl. 562, which held that the TIN was determinative of same-taxpayer status. (A16.)

In the CFC's view, the TIN was a relevant "analog for sameness" outside the merger context because it remains constant despite changes in corporate structure, but was not a good analog in the merger context. (A17.) In this regard, the CFC noted that the acquired corporation loses its TIN in a merger, because the acquired corporation ceases to exist and its TIN is discarded, but its business continues as part of the surviving corporation with a different TIN. (A17-18.) The CFC further emphasized that the surviving corporation becomes liable "retroactively" for the acquired corporation's taxes and is entitled to any refunds due to the acquired corporation, which the court equated with "the law treat[ing] the acquired corporation as though it had always been a part of the surviving entity." (A17.) The court concluded (A18) that "where a statutory merger has occurred, the surviving corporation is the 'same taxpayer' as the acquired corporation for purposes of I.R.C. § 6621(d)." The CFC viewed its holding as consistent with other federal statutes that generally prohibit transferring or assigning of claims, but allow transfer of claims in the merger situation. (*Id.*)

The court was not persuaded by the Government's contention that netting claims are not among the "tax attributes" that transfer in a

statutory merger under I.R.C. § 381, and agreed with Wells Fargo's assertion that interest is part of the tax, and tax is part of the assets and liabilities that become attributes of the post-merger surviving corporation, when the pre-merger corporations cease their separate existence. (A20.)

The CFC also cited IRS advice from other contexts, which the court opined (A19-26) demonstrated that the IRS has "consistently applied its rules to find that the parties to a statutory merger are the same following the merger." (A19.) The court also cited, as "informative" (A23 n.12), several informal IRS advice memoranda that it found supported the view that netting between merged corporations was permissible. Finally, the CFC was of the view that application of I.R.C. § 6402, which the CFC thought was "analogous" to § 6621(d), supported its position, because the IRS had "consistently allowed offsetting by the surviving corporation with overpayments made by an acquired entity." (A25.)

SUMMARY OF ARGUMENT

Section 6621(d) provides for a "net interest rate of zero" on "equivalent underpayments and overpayments by the same

taxpayer . . . " The CFC erred in concluding that the entities seeking to apply netting in Situations 1 and 3 are the "same taxpayer" within the meaning of § 6621(d).

1. In Situation 1, separate corporations made the overpayment and the underpayment before they merged. After the merger, the acquiring corporation, First Union, sought to net interest on its pre-merger underpayment against the pre-merger overpayment of the acquired corporation, Old Wachovia. Under *Energy East*, 645 F.3d 1358, netting is not available in Situation 1. *Energy East* holds that § 6621(d) imposes a temporal requirement, and that the entities seeking to apply netting must be the "same taxpayer" at the time the overpayments and the underpayments were made. It does not matter whether a later combination subsequently makes the entities the same taxpayer, or whether the underpayment liability and interest thereon was payable by the same taxpayer that had a right to claim the overpayment and interest thereon. In Situation 1, netting should not have been allowed, because First Union and Old Wachovia were separate when the overpayment and underpayment were made.

Magma, 101 Fed. Cl. 562, also supports reversal in Situation 1. There, the CFC recognized that, where the overpayment and underpayment were made before any affiliation of the companies, the statutory requirement that the underpayment and overpayment be made by the same taxpayer is not met. Moreover, the *Magma* court arrived at a workable test for more complex fact situations, which looks to whether the TIN remains the same, and under which netting also is not permissible in Situation 1.

The CFC erred in concluding that the later merger made First Union and Old Wachovia "retroactively" the same taxpayer. Merger statutes recognize the pre-merger separate existence of the merged entities, and provide for forward-looking transfer of assets, claims, and liabilities to the acquiring and surviving entity. The fact that one entity succeeds to the liabilities and rights of another does not make the acquired and acquiring corporation the "same taxpayer," and it certainly does not make them the same *before* the merger occurs, which under *Energy East* is the relevant inquiry in Situation 1.

The CFC's conclusion that a merger makes the merged corporations retroactively the "same taxpayer" also is inconsistent with

the Code's provisions for annual accounting by each separate corporate entity, and I.R.C. § 381, which provides for a limited list of tax attributes to pass from one entity to "another" after a merger or certain other reorganizations. On the other hand, the offset rules set forth in I.R.C. § 6402, which does not contain the restrictive "same taxpayer" language, do not support the CFC's holding. And the CFC's reasoning that, because liability for interest follows liability for the tax, the right to netting likewise should follow the tax liability, cannot be squared with *Energy East*. The CFC thus erred in permitting netting in Situation 1.

2. The CFC incorrectly allowed netting in Situation 3, involving netting of a pre-merger overpayment by the acquired entity, CoreStates, against a post-merger underpayment by the surviving corporation, First Union. Under *Energy East,* for netting to be permissible, CoreStates, at the time of its pre-merger overpayment, must be the "same taxpayer" as First Union after the merger, when the underpayment was made. The CFC erred in concluding the two were the same.

"Same" is defined as identical or, alternatively, having the same relevant essentials. Post-merger First Union and pre-merger CoreStates obviously are neither identical nor the same in terms of key relevant essentials. The *Magma* court correctly held that the TIN is the critical identifier of a unique taxpayer, and that whether two entities have the same TIN determines whether they are the same taxpayer. Under this test, which we urge this Court to adopt, the entities in Situation 3 are not the same taxpayer. But even if a broader inquiry into overlap of relevant essentials were appropriate, the TIN is a key factor that the CFC erroneously disregarded. When the TIN is considered, along with the many other differences between pre-merger CoreStates and post-merger First Union, it is apparent that the two are not the "same taxpayer" under any reasonable reading of that statutory language.

The case law pre-dating I.R.C. § 381, dealing with transfer of attributes in a merger, which Wells Fargo urged supported its suggestion that the constituent corporations and the surviving corporation after a merger are the same taxpayer, is not relevant here. None of those cases addressed statutory language using the phrase

"same taxpayer." And § 381 now makes clear that a merger does not make all the participants in a merger the same taxpayer; it provides that certain specific attributes are transferred from one taxpayer to "another," and interest netting is not one of them. Indeed, a contrary rule potentially could lead to trafficking in interest netting analogous to the trafficking in net operating losses that Congress specifically interdicted. *See* I.R.C. §§ 269, 382.

The CFC's opinion is wrong and should be reversed.

ARGUMENT

I

THE CFC ERRED IN PERMITTING NETTING IN SITUATION 1, WHERE BOTH THE OVERPAYMENT AND UNDERPAYMENT WERE MADE BEFORE THE MERGER

Standard of review

The CFC's partial summary judgment ruling is reviewed *de novo*. *Swisher Int'l, Inc. v. United States*, 205 F.3d 1358, 1364 (Fed. Cir. 2000).

A. Introduction to interest netting under I.R.C. § 6621(d)

In general, if a taxpayer underpays its tax liability, interest accrues on the underpayment, and, if it overpays its tax, interest

accrues on the overpayment. I.R.C. §§ 6601(a), 6611(a). Until 1986, interest generally accrued on underpayments and overpayments at the same rate (except as to underpayments attributable to tax-motivated transactions). *See* I.R.C. § 6621 (26 U.S.C., 1982 ed.); Department of the Treasury, Office of Tax Policy, Report to Congress on Netting of Interest on Tax Overpayments and Underpayments (April 1997) (hereinafter, "Treasury Report") (available at http://www.treasury.gov/resource-center/tax-policy/Pages/reports_congress.aspx (last visited May 8, 2015)). In 1986, however, Congress amended I.R.C. § 6621, making the interest rate on underpayments one percentage point higher than the rate on overpayments. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1511(a), 100 Stat. 2085, 2744. Amendments to § 6621 further increased the maximum possible interest-rate differential between the overpayment rate and the underpayment rate, so that by 1994 the gap became as much as 4.5 percent for large corporations. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11341(a), 104 Stat. 1388, 1388-470 (amending § 6621(c)); Uruguay Round Agreements Act, Pub. L. No. 103-465, § 713, 108 Stat. 4809, 5001 (1994); Treasury

Report at 1, 11-12. In the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3302, 112 Stat. 685, 741 ("RRA '98"), Congress realigned overpayment and underpayment interest rates to make them the same for individual taxpayers, but maintained the interest rate differential for corporate taxpayers. RRA '98 § 3302 (codified as I.R.C. § 6621(a)(1))*; see also* I.R.C. § 6621(c)(maintaining a larger differential for C corporations with underpayments exceeding $100,000).

Interest netting became relevant because of this interest rate differential. Absent netting, an overlapping mutual obligation would generate a net liability on the taxpayer's part, even if the Government and the taxpayer owed each other identical amounts. In the legislative history of interest-rate-differential provisions enacted between 1986 and 1998, Congress urged the IRS, to the extent consistent with "sound administrative practice," to "'net'" a taxpayer's underpayments and overpayments to avoid charging the interest-rate differential in mutual indebtedness situations. Treasury Report at 1.

The IRS followed Congress's instructions to implement interest netting to the extent it concluded the Code allowed it. *Id*. at 12-40. The

IRS determined that existing Code provisions permitted netting only where the same taxpayer had underpayments and overpayments within a single year (known as "annual" netting). The IRS also determined that the interest rate differential could be avoided where a taxpayer simultaneously had outstanding tax underpayments and overpayments for different years through a procedure known as "offsetting," based on I.R.C. §§ 6402(a) and 6601(f). Treasury Report at 9-15. The IRS determined, however, that it lacked statutory authority to "offset an underpayment with an overpayment that had been refunded, or conversely, offset an overpayment with an underpayment that had been satisfied." *Energy East*, 645 F.3d at 1360.

In 1998, Congress enacted I.R.C. § 6621(d) (added to the Code as RRA '98 § 3301), which provided:

> To the extent that, for any period, interest is payable under subchapter A [interest on underpayments] and allowable under subchapter B [interest on overpayments] on equivalent underpayments and overpayments by the *same taxpayer* of tax imposed by [Title 26 of the United States Code], the net rate of interest under this section on such amounts shall be zero for such period.

I.R.C. § 6621(d) (emphasis added). The "'for any period' language" allowed netting where the same taxpayer had overpayments and

underpayments that overlapped but were not necessarily simultaneously outstanding. *Energy East*, 645 F.3d at 1360. Section 6621(d) is unique. It is the only provision in the Code that uses the phrase "same taxpayer" to limit the circumstances where a tax benefit is available.[10] There are no Treasury Regulations interpreting the "same taxpayer" requirement.

Here, Wells Fargo seeks netting under § 6621(d) based on overlapping overpayments and underpayments made by corporate entities that were unrelated at the time of their respective tax underpayments, overpayments, or both, but that later merged. By its terms, however, § 6621(d) limits interest netting to circumstances in which there are "equivalent underpayments and overpayments by the same taxpayer." As explained below, the CFC erroneously held that the statutory language permits netting in Situations 1 and 3 here. It disregarded controlling case law, and based its holding on its incorrect

[10] The phrase "same taxpayer" appears in only two other sections of the Code, §§ 989(c)(5) and 7430(e)(2), neither of which concern benefits provided to taxpayers.

conclusion that a merger makes the constituents the "same taxpayer," even retroactively.

B. The CFC erred in not following *Energy East*

Energy East, 645 F.3d 1358, is dispositive of Situation 1, in which it is undisputed that the underpayment and overpayment both were made before the merger. In *Energy East*, this Court held that I.R.C. § 6621(d) imposes a temporal requirement, under which a court must look to the time the overpayment and underpayment were made to evaluate whether they were made by the same taxpayer. Entities that were then unaffiliated are not the same taxpayer; it does not matter that a subsequent acquisition might make them the same taxpayer thereafter.

In *Energy East,* Energy East sought to net its own underpayment interest against interest on overpayments made by two companies it later acquired, and that became part of Energy East's affiliated group of corporations, which filed a consolidated tax return. All the underpayments and overpayments were made, however, before the acquisition, as was the scenario in Situation 1 here. Rejecting Energy East's arguments that it and its subsidiaries were the "same taxpayer"

because they were part of the same consolidated group during part of the time that outstanding overpayments and underpayment overlapped or, alternatively, when the netting claim was asserted, this Court held that § 6621(d) required comparing the two taxpayers on the dates the overpayment and underpayment were made, not later. 645 F.3d at 1361. The Court therefore found it unnecessary to decide whether the later acquisition made Energy East and its subsidiaries the same taxpayer, because a later acquisition could not affect whether the corporations were the same taxpayer before the acquisition, when the overpayments and underpayment were made.

The *Energy East* Court emphasized that its holding rested on the statutory language, which it found unambiguous. *Id.* at 1361-62. The Court applied the "last antecedent rule," under which "a limiting clause or phrase 'should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" *Id.* (quoting *Barnhart v. Thomas,* 540 U.S. 20, 26 (2003)). The Court concluded that, because the phrase "'by the same taxpayer' immediately follows and therefore refers to 'equivalent overpayments and underpayments,'" "the statute provides an *identified* point in time at which the taxpayer must be the same, *i.e.*,

when the overpayments and underpayments are made." *Id.* (emphasis in opinion) (quoting I.R.C. § 6621(d)). The Court rejected Energy East's contentions that the statute provided "no 'point in history' that taxpayers must be the 'same' prior to filing a netting claim," and that it was sufficient if the entities were the "same taxpayer" during some of the time in which interest payable on the respective overpayments and underpayments overlapped, or at the time the netting claim was asserted, because those contentions "ignore[d] the plain language of the statute." *Id.* at 1361-63.

The Court opined that Energy East's arguments would require reading the statute as providing: "'[t]o the extent that, for any period, interest is payable . . . by the same taxpayer,' interest netting is allowed on equivalent overpayments and underpayments,'" but that this is not what the statute provides. *Id.* at 1362-63. *Energy East* made clear that § 6621(d)'s statutory language is not properly read to permit netting based on the same taxpayer's liability for interest. *Id.* (emphasizing that the phrase "by the same taxpayer" modifies "underpayments and overpayments," not the phrase "for any period, interest is payable"). The fact that liability for the underpayment of tax and interest thereon,

and the right to a refund of the overpayment interest, may wind up in the hands of the same taxpayer is insufficient to allow netting. *Id.* at 1362.[11]

In Situation 1, as in *Energy East,* it was undisputed that the underpayments were made by one corporation (First Union), and that the overpayments were made by a separate corporation (Old Wachovia) before those corporations were affiliated in any way. *Energy East* precludes netting in that circumstance, because § 6621(d)'s language leaves no doubt that netting is permissible only if the entity with the

[11] In light of *Energy East*, the CFC's reliance (A24) on the earlier advice ("FSA") 200212028, 2002 WL 442928 (March 22, 2002), is misplaced. That advice, in its "Situation 5," suggested that where an acquired entity had a pre-merger overpayment, and the acquiring entity had a pre-merger underpayment in year 3, and the two later merge, the post-merger surviving entity could net the underpayment interest and overpayment interest because it is "is both entitled to A's overpayment, and is liable for B's underpayment." *Energy East* rejected the advice's suggestion that inheriting the liability for an underpayment and the right to receive a overpayment makes two pre-merger taxpayers the "same" for § 6621(d) purposes.

Such informal written determinations are not authoritative in any event. *See* I.R.C. § 6110(k)(3) (informal "written determination[s]" may not be cited as precedent). *See Nathel v. Commissioner*, 615 F.3d 83, 93 (2d Cir. 2010); *Tupper v. United States*, 134 F.3d 444, 448 & n. 5 (1st Cir.1998); *Disabled Am. Veterans v. Commissioner*, 942 F.2d 309, 315 n.5 (6th Cir. 1991).

underpayment and the entity with the overpayment were the "same taxpayer" at the time the respective overpayments and underpayments were made. *Id.* at 1361-63. The Court in *Energy East* found it unnecessary to reach the question whether the later reorganization made the entities the same taxpayer, so *Energy East* is not distinguishable on the ground that the later combination of the entities in *Energy East* was an acquisition rather than a merger. The CFC erred in concluding otherwise.

C. Netting in Situation 1 also is not permissible under *Magma*

Magma, 101 Fed. Cl. 562, further confirms that the CFC erred in allowing netting in Situation 1. The *Magma* court explained:

> Both the underpayments and the overpayments of all three entities involved in [Energy East] occurred *prior* to the merger and before any relationship, formal or informal, developed among the companies. . . . . Under those circumstances, it was abundantly clear that the three companies were not the same taxpayer for purposes of netting interest on their respective underpayments and overpayments.

101 Fed. Cl. at 570 (citation omitted and emphasis in original). Under *Energy East*, the *Magma* court explained, a party could not "advocat[e]

an extension of same taxpayer status retroactively based on post-return merger activity." *Id.*

The *Magma* court also recognized that a clear-cut test was needed to resolve whether entities that had been combined through mergers and acquisitions were the same taxpayer in circumstances that are not so "abundantly clear," 101 Fed. Cl. at 570, as in *Energy East* and Situation 1. In that regard, the *Magma* court concluded that whether the underpayments and overpayments are attributable to a corporate entity with the same TIN provided a workable test for whether entities were the same taxpayer, irrespective of intervening merger activity. *Id.* at 576. The court reasoned that such an approach was consistent with Congress's legislative intent, because tax law recognizes the TIN as identifying a unique taxpayer.[12] Under *Magma*'s TIN test, as well as this Court's approach in *Energy East*, where the entities undisputedly were entirely unrelated when the overpayment and underpayment were made, netting is not permissible in Situation 1. (*See* A663, 671 (stipulations regarding TINs).)

---

[12] *Magma*'s reasoning is discussed further at pp. 50-53, *infra.*

D. The CFC erred in concluding it need not follow *Energy East* and *Magma* because they did not involve mergers

Energy East's holding was based on application of the last-antecedent rule to plain statutory language, not the peculiarities of acquisitions involving consolidated groups versus statutory mergers or other types of reorganizations. The CFC, however, disregarded this Court's statutory construction, opining that it and *Magma* were not controlling, because this case involved a merger rather than an acquisition. It erred in doing so.

In the CFC's view, a statutory merger makes merged corporations "one and the same" not only for future, post-merger purposes, but also "retroactively." (A16-17.) It thus concluded that the pre-affiliation timing of the overpayments and underpayments, on which *Energy East* turned, was irrelevant in the merger context. But the CFC's view that "the law treats the acquired corporation as though it had always been part of the surviving entity," and "retroactively" so, distorts what happens in a merger under state law. (A17.) Moreover, federal tax law, which governs whether two corporations are the "same taxpayer" under I.R.C. § 6621(d), does not support the CFC's conclusion that a later

merger retroactively makes the once separate entities the "same taxpayer," and that it therefore becomes irrelevant that they were separate when the underpayment and overpayment were made.

1. The CFC erred in equating the surviving corporation's assumption of liabilities with making all parties to a merger the same taxpayer

"A merger of two corporations contemplates that one corporation will be absorbed by the other and will cease to exist while the absorbing corporation remains." *Bowers v. Andrew Weir Ship., Ltd.,* 27 F.3d 800, 806 (2d Cir. 1994) (citing *Engel v. Teleprompter Corp.*, 703 F.2d 127, 131 (5th Cir. 1983)). Thus, before the merger, two separate corporate entities exist (each of which is a separate taxpayer), and thereafter "the acquired firm disappears as a distinct legal entity." *Frandsen v. Jensen-Sundquist Agency, Inc.*, 802 F.2d 941, 944 (7th Cir. 1986); *see also* 15 FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS, § 7082 (Westlaw Sept. 2014) ("when a merger becomes effective, the entity that is designated in the plan of merger as the surviving corporation continues, and the separate existence of every entity that is merged into the survivor ceases"); *Fidanque v. American Maracaibo Co.*, 92 A.2d 311, 315 (Del. Ch. 1952). As the CFC recognized, the surviving corporation

after a merger generally is liable by operation of state law for the obligations and liabilities of the entities it has acquired. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 n.3 (1964); Treas. Reg. § 1.368-2(b)(1)(ii) (statutory merger is one in which, pursuant to the applicable statute and as a result of operation of that statute, all the assets and liabilities of the acquired corporation are transferred to the acquiring corporation, and the acquired corporation ceases to exist); 19 C.J.S. *Corporations*, § 909 (Westlaw March 2015) (a new corporation created by merger "succeeds to all the rights, powers, and privileges of the original corporations, including causes of action and contract rights"); *see also* 8 Del. Code Ann. § 259(a).

It does not follow from these merger principles, however, that, once the merger occurs, "the law treats the acquired corporation as though it had always been part of the surviving entity," so that the acquired, acquiring, and surviving corporations are all one – even retroactively – making irrelevant their status as separate taxpayers when the underpayment and overpayment were made. (A17.) To the contrary, merger principles establish that the acquired corporation, which pre-merger was a "separate entity," ceases to exist, and only

certain of its attributes are carried on by the surviving corporation, which also acquires its assets and assumes its liabilities. That certain attributes and assets are transferred and liabilities are assumed does not mean that the surviving corporation is the "same" as the acquired and the acquiring corporations. And it certainly does not follow that the acquired and acquiring corporations retroactively become the "same taxpayer" at a point in time before the merger which, as *Energy East* makes clear, is the relevant inquiry for Situation 1, where both the overpayment and underpayment pre-dated the merger.[13]

---

[13] The IRS allows the surviving corporation in a merger, as the "successor corporation," to make a claim for refund or credit "in the name of, and on behalf of, the [predecessor] corporation which paid such taxes." Rev. Rul. 54-17, 1954-1 C.B. 160. Similarly, the IRS recognizes that the successor corporation can agree to extend statutes of limitations "on behalf of an absorbed constituent." Rev. Rul. 59-399, 1959-2 C.B. 488. Rev. Rul. 59-399 does not mean, however, that the surviving corporation and its constituents are actually the "same taxpayer" as § 6621(d) requires. Section 6621(d) does not use the flexible terminology "in effect the same taxable entity" that Rev. Rul. 59-399 does. Moreover, Rev. Rul. 59-399 is written in terms of the resultant corporation as "transferor" acting "on behalf of" the transferee, making clear that the surviving corporation and its constituents are not actually the "same taxpayer." *See Estate of Stauffer v. Commissioner*, 48 T.C. 277, 307 (1967) (entities were not same taxpayer, but one, as successor to the other, "had full standing to apply for and receive a refund" of the other's taxes under Rev. Rul. 54-

(continued…)

Although the liabilities that a surviving corporation assumes may have arisen in the past, the absorption of one entity's business by the other, and the accompanying assumption of liabilities, begins when the merger occurs. The merger does not change the past to make entities that were separate before the merger retroactively the same. Indeed, the Delaware merger statute, which Wells Fargo asserted below is representative of all state merger statutes relevant here (A1566), describes the surviving corporation's acquisition of the acquired corporation's rights, property, and liabilities as forward-looking, to the time after the merger. *See* 8 Del. Code Ann. § 259(a) (repeatedly using the future-tense construction "shall" in describing the rights and obligations of the constituent corporations that "shall be" vested in or assumed by the surviving corporation). The principle that the survivor of a merger inherits the assets and liabilities of its predecessors neither erases the acquired entity's prior separate existence, nor makes the acquired entity the "same" for all purposes as the survivor of a merger.

(…continued)
17, 1954-1 C.B. 160), *rev'd on other grounds*, 403 F.2d 611 (9th Cir. 1968).

And it certainly it does not make the acquired and acquiring corporations the same taxpayer retroactively for purposes of the pre-merger inquiry that is the relevant consideration in Situation 1 here.

The fact that one person or entity is the successor to another is distinct from the two being the same. *Compare* BLACK'S LAW DICTIONARY at 1569 (9th ed. 2009) (defining "successor" as "a person who succeeds to the office, rights, responsibilities, or place of another; one who replaces or follows a predecessor" or "[a] corporation that through amalgamation, consolidation, or other assumption of interests is vested with the rights and duties of an earlier corporation") *with* WEBSTER'S THIRD NEW INT'L DICTIONARY at 2007 (1969) (hereinafter, "WEBSTER'S") (defining "same" as "resembling in every way" "not different in relevant essentials").[14]

---

[14] As an example, a son, as the administrator and sole beneficiary of his deceased father's estate, may inherit his father's assets, subject to his liabilities. But the father and son are not one and the same. Likewise, the fact that a surviving corporation following a merger may inherit its predecessors' liabilities does not mean that the two predecessor corporations are the "same" for interest-netting purposes. If they were, there would be no need for any discussion of the surviving entities' rights and obligations as "successors."

To the extent courts in successor liability cases have described merged entities as the same, it is only for purposes of ascertaining whether one succeeds to the liabilities of the others. Thus, in *Anspec Company, Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1244-45 (6th Cir. 1991), on which Wells Fargo relied below (A1572), when the court described the Michigan merger statute as providing that "the surviving corporation and merged corporation are one and the same," the court so stated only "[f]or purposes of liability." *Id.* at 1245. Simply put, it was a shorthand way of stating that, once the merger occurred, liabilities of one now belonged to the other.

Accordingly, it is incorrect to say that the acquired and acquiring entities become the same retroactively, even though the claims or liabilities assumed by the acquiring entity at the point of merger may have arisen in the past. Rather, the liabilities and assets, going forward, are in the hands of the acquiring corporation, as successor to the acquired corporation.

Netting under § 6621(d), however, requires more than succession by one entity to the liabilities of another. As discussed above (pp. 27-31, *supra*), this Court in *Energy East* specifically rejected a reading of

§ 6621(d) under which the availability of netting turned on whether the liability for the underpayment and interest thereon and the right to recover the overpayment and interest thereon wound up in the hands of the same taxpayer. It therefore is clear that the assumption of liabilities and transfer of rights that occurs in a merger does not make the pre-merger acquired entity the "same taxpayer" as the pre-merger acquiring entity.[15]

2. The notion that a merger makes previously separate taxpayers the "same taxpayer" is incompatible with multiple Internal Revenue Code provisions

The CFC's view – that "the law treats the acquired corporation as though it had always been part of the surviving entity," and that they

[15] As discussed *infra* (pp. 48-49), holding that the "same taxpayer" requirement is met where a taxpayer has an overpayment and its successor has an underpayment disregards Congress's use of the word "same," contrary to the rule of construction that a statute should be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotes and citation omitted). If Congress meant netting to apply among a taxpayer and a successor, it could have said so. But it did not. And, as this Court pointed out in *Energy East*, the "court cannot simply add phrases or words that do not appear in the statute; doing so would be phantom legislative action by this court." 645 F.3d at 1362.

are thus the "same taxpayer" for past tax periods (A17) – is not consistent with federal tax law.[16] The income tax system generally does not contemplate retroactive change that could allow one taxpayer to become "the same taxpayer" as another, after the close of a taxable period in which they were separate. Taxes are computed based on annual accounting principles that, with limited exceptions, are based on each unique taxpayer's income and losses for a specified year. *United States v. Skelly Oil Co.*, 394 U.S. 678, 681 (1969) (recognizing "Congress' adoption of an annual accounting system as an integral part of the tax code"); *see also United States v. Lewis*, 340 U.S. 590, 592 (1951); *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359, 364-65 (1931). Further, tax law generally requires recognition of every corporation as a separate taxable entity, so long as it has some business purpose. *See Moline Properties v. Commissioner*, 319 U.S. 436, 438-39 (1943); *New Colonial Ice v.*

[16] State merger statutes providing for transfer of assets and assumption of liabilities confer only what it is within the state's power to give—property, rights, and privileges under state law. They do not "identify[]" what constitutes a unique "taxpayer under the Federal taxing statute." *Standard Silica Co. v. Commissioner*, 22 B.T.A. 97, 99 (1931); *see also Morgan v. Commissioner*, 309 U.S. 78, 80 (1940) ("State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed.").

Helvering, 292 U.S. 435, 441 (1934). For "every" unique corporation, the Code requires computing a tax liability for "each taxable year." I.R.C § 11. Furthermore, "[e]very corporation subject to taxation" must file either its own income-tax return (I.R.C. § 6012(a)(2)), or be included on the consolidated return of a common parent (I.R.C. § 1501)). Any taxpayer not in existence during the whole of an annual accounting period is required to file a return for the fractional part of the year in which it was in existence. I.R.C. § 443(a).

The CFC's view that a merger amalgamates the separate taxable entities that existed before the mergers, so that the two separate entities can be considered the same taxpayer retroactively, is incompatible with these provisions. Similar attempts to retroactively disregard such pre-merger separateness have been rejected. *See American Cement Corp. v. United States,* 234 F. Supp. 375 (E.D. Pa. 1964) (where a surviving corporation in a merger sought a refund for a pre-merger year based on overpayment by one corporation, the court rejected the Government's argument that recovery should be reduced under a recoupment theory, to the extent of another constituent corporation's underpayment (as to which the limitations period barred

collection) because the merged entities collectively had not overpaid tax for the pre-merger year).

Moreover, when a merger occurs mid-year, the acquired entity files its own return for the short taxable year prior to the merger (after which it ceases to exist), and the surviving entity files a return for a full year reflecting the acquiring entity's pre-merger income and the merged corporation's income. *See* I.R.C. § 443(a)(1); Treas. Reg. §§ 1.381(b)-1(a)(1), 1.381(b)-1(c). That the acquired entity computes its own tax liability on its own final pre-merger return confirms that Congress did not view the acquired entity as the "same taxpayer" as either the pre-merger acquiring corporation or the post-merger surviving entity.

Code Section 381, which provides for carryover of certain tax attributes in certain corporate reorganizations under I.R.C. § 368(a), including statutory mergers, also contradicts the notion that a merger causes the acquired and acquiring corporation to become the same taxpayer. Section 381(a) provides that where a corporation's assets are acquired "by *another* corporation," in a reorganization under I.R.C. § 368 (a) (which includes statutory mergers, *see* I.R.C. § 368(a)(1(A); BITTKER & EUSTICE, ¶ 14.20), "the acquiring corporation shall succeed to

and take into account" an enumerated list of "items described in subsection (c) of the distributor or transferor corporation." I.R.C. § 381(a) (emphasis added). The listed items do not include interest netting. I.R.C. § 381(c).

Section 381(a)'s language contemplates the acquisition of assets of one corporation by "another corporation," and succession to attributes of a "distributor or transferor corporation." That statute, clearly intended to apply to mergers, reflects Congress's view that the acquiring corporation and acquired corporation in a merger are not the "same taxpayer." Indeed, such language would be unnecessary if tax attributes automatically were shared between merged entities because the merger made the entities the same taxpayer.[17]

[17] As explained *infra* (pp. 56-63) with regard to Situation 3, case law pre-dating § 381 and addressing whether certain tax attributes passed from one entity to another following a merger, which Wells Fargo cited below, does not support its argument, and the CFC correctly did not cite that case law in support of its holding. In any event, the pre-§ 381 case law has no relevance to Situation 1, because it addresses only transfer of attributes *after* a merger. Similarly, cases involving transfer of rights or obligations to a successor *after* a merger in other statutory contexts (*see* A18 and pp. 64-67, *infra*) provide no support for the CFC's holding in Situation 1.

3. Code Sections §§ 6601(e) and 6402(a) do not support the CFC's holding

The CFC erred in concluding that I.R.C. §§ 6601(e) and 6402(a) support its holding. The CFC opined that I.R.C. § 6601(e), which provides that interest "'shall be assessed, collected, and paid in the same manner as taxes'" means that interest, "including netting," is a tax attribute that follows the tax liability and is not limited by § 381. (A20-21.) But, as discussed above, Congress did not provide that the right to net interest follows the tax liability, as it did with underpayment interest generally in § 6601(e). Rather, Congress specifically limited netting to the circumstance of an equivalent overpayment and underpayment made by the "same taxpayer."

The CFC also erred in finding support for its analysis in the IRS's practices under I.R.C. § 6402(a). (A25.) Section 6402(a) does not contain the "same taxpayer" language that restricts the availability of netting. It permits offsetting for the "person who made the overpayment," making it possible for one entity to make a tax overpayment for another entity and thus avail itself of offsetting,

without being the "same taxpayer" as the latter entity. Section 6402 of little relevance to construing § 6621(d).[18]

The CFC's holding as to Situation 1, which conflicts with *Energy East* and *Magma,* should be reversed.

II

THE CFC ERRONEOUSLY ALLOWED NETTING IN SITUATION 3

A. Under *Energy East,* § 6621(d) requires comparing the entities as of the time the overpayment and the underpayment were made

Situation 3 presents the question whether a pre-merger acquired corporation (CoreStates) is the same taxpayer as the post-merger surviving corporation (First Union). As discussed above (pp. 27-31, *supra*), *Energy East*, 645 F.3d 1358, makes clear that the question the Court should address in deciding if § 6621(d)'s "same taxpayer" requirement was met is *not* whether CoreStates and First Union became the "same taxpayer" after the merger. Rather, the Court should

---

[18] The CFC's reliance (A26) on FSA 200027026, 2000 WL 33116161 (July 7, 2000), involving § 6402(a)'s application is thus misplaced. That advice is outdated in light of *Energy East* and *Magma,* and not authoritative in any event. *See* note 11, *supra.*

consider whether CoreStates, when it made the overpayment before the merger, is the same taxpayer as First Union after the merger.

In contrast with Situation 1, where the entities obviously were different before the merger, Situation 3 requires comparing entities with some overlapping attributes to ascertain whether they are the same. Once the merger occurs, the pre-merger acquired corporation and surviving corporation have some similarities, by virtue of the fact that the acquired corporation's assets and liabilities transfer to the surviving entity, which also may continue the acquired corporation's businesses. That said, the acquired corporation and the surviving corporation are different in that the acquiring corporation has its own business operations, assets, and liabilities that are different from those of the acquired corporation, and has a different TIN. Here, the CFC concluded that a merger automatically makes all participants the "same taxpayer;" when it in fact means only that the surviving corporation succeeds to certain attributes of the acquired corporation. (*See* pp. 33-44, *supra*; pp. 56-67, *infra*). In doing so, the CFC incorrectly analyzed the situation, which requires comparing pre-merger CoreStates and

post-merger First Union, and determining whether their common attributes are sufficient to make them the "same taxpayer."

B. *Magma*'s TIN test provides a practical test for ascertaining whether two entities are the "same taxpayer" that is consistent with the statutory language

1. The meaning of "same"

It is well established that statutory language should be construed consistently with its ordinary meaning, and dictionaries often serve as a guide in that regard. *See Pesquera Mares Australes Ltd. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). Dictionary definitions of "same" make clear that for two entities to be the "same" a certain identity is required between them. *See* WEBSTER'S at 2007. Most commonly, "same" is defined as "resembling in every way," *id.*, or "identical." *In re Longi*, 759 F.2d 887, 892 (Fed. Cir. 1985) ("same invention" in double-patenting doctrine means "an invention drawn to identical subject matter"); *Mississippi Poultry Ass'n v. Madigan*, 992 F.2d 1359, 1364 (5th Cir. 1993) (definition of "'the same' is congruent with 'identical.'"); *Energy East*, 92 Fed. Cl. 29, 34 (2010) (applying "dictionary definition of 'same'" under which "the taxpayer [must] be 'identical' 'without addition, change, or discontinuance.'"), *aff'd,* 645

F.3d 1358. Congress's use of the word "same" should not be rendered meaningless by disregarding it or treating it as the as equivalent of "successor." *See* WEBSTER'S at 2007; WEBSTER'S COLLEGIATE THESAURUS at 699 (1976); *see also Duncan*, 533 U.S. at 174 (statute should be construed so that no part is rendered superfluous).

If "same," as used in § 6621(d), means "identical," netting would not be permissible in *any* of the test situations. But, as the *Magma* court recognized, to require absolute identity would make interest netting generally inapplicable to "the companies that are most likely to take advantage of interest netting," because "[t]he reality is that the make-up of large corporations . . . undergo[es] regular changes." *Magma,* 101 Fed. Cl. at 571. Thus, the *Magma* court rejected attributing to the "same taxpayer" phraseology a requirement of absolute identity, and, as our concession with respect to Situation 2 indicates, we have not argued that entities seeking netting must be completely identical. But in order for the word "same" not to be rendered superfluous (*see Duncan*, 533 U.S. at 174), "same" should be given its alternative meaning, *viz.*, having an identity of "relevant essentials." WEBSTER'S at 2007.

2. The *Magma* court adopted a practical test, based on whether the TIN is the same, that is consistent with § 6621(d)'s statutory language

In *Magma,* the court found the TIN to be the key relevant essential, and thus determinative of same-taxpayer status, opining that there "seems no better plain meaning of the term 'same taxpayer' than 'same taxpayer identification number.'" 101 Fed. Cl. at 569. The *Magma* court reasoned that, although the Code does not define the phrase "same taxpayer," it does define a "taxpayer" as "any person subject to any internal revenue tax," and a "person . . . to mean and include an individual, a trust, estate, partnership, association, company or corporation." I.R.C. § 7701. A taxpayer, in turn, is identified by a TIN. 101 Fed. Cl. at 569. As the court emphasized, "the importance of the identification number is well documented." *Id.* The court thus concluded that the TIN is the critical identifier of a unique taxpayer.

The *Magma* court's approach is a reasonable one. Because the word "same" in § 6621(d) modifies "taxpayer," it makes sense to focus on what normally identifies a unique taxpayer. The TIN is the most significant identifier of a particular corporate taxpayer. As discussed above (pp. 42-44), the concept that every corporation is a separate

taxable unit is an integral part of the federal income tax system, and the Code requires computing a tax liability for "every" unique corporation for "each taxable year." *See* I.R.C. §§ 11, 1501, 6012(a)(2).

Section 6109(a)(1) requires each taxpayer to include its unique TIN on every return, statement, or other document that it files:

> Any person required . . . to make a return, statement, or other document shall include in such return, statement, or other document such identifying number as may be prescribed for securing proper identification of such person.

I.R.C. § 6109(a). When enacting § 6109, Congress explained that, through the use of TINs, each taxpayer would have a "single file which would contain, in one place, information relative to all of the tax transactions involving a taxpayer." S. Rep. No. 87-1102 at 2 (1961), *reprinted in* 1961 U.S.C.C.A.N. 3344, 3345. Because the TIN identifies a particular taxpayer, it follows that if two entities do not share the same TIN, they should not be the "same taxpayer." *Magma*, 101 Fed. Cl. at 569.

Moreover, a TIN-based test provides the IRS with an administratively manageable test, sensibly grounded in the most basic principles for identifying a taxpayer, to ascertain if entities claiming netting are the "same taxpayer." And it eliminates the uncertainty for

taxpayers inherent in a more fact-specific comparison of relevant essentials. The Court should adopt *Magma*'s workable test here, under which netting should not have been allowed in Situation 3. (*See* A680-81 (stipulations regarding TINs of pre-merger CoreStates and post-merger First Union)); Rev. Rul. 73-526, 1973-2 C.B. 404 (holding that the surviving corporation in a merger should continue to use its previously assigned TIN, and that the TIN of the acquired corporation, which is dissolved by operation of law and has filed its final return, should be discontinued).

C. Even under a broader inquiry into corporate identity, netting should not have been allowed in Situation 3

Quite apart from their different TINs, pre-merger CoreStates and post-merger First Union lack the identity of relevant essentials necessary to make them the same taxpayer. First Union was incorporated in North Carolina under the name "First Union Corporation," and maintained one principal executive office, in Charlotte. (A682, 1302-04.) Pre-merger CoreStates was incorporated under the name "CoreStates Financial Corporation," and maintained one principal executive office, in Philadelphia. (A682, 1069-71.) There

were significant geographic differences between the entities' business operations. In 1999, when its underpayment was made, post-merger First Union had 1,946 bank branches throughout much of the eastern United States, including the District of Columbia and 12 states. (A1338-39.). In 1992, when its overpayment was made, pre-merger CoreStates had 360 locations in four states. (A1071, 1162 ("Banking Subsidiaries & "Number of Locations").) Moreover, when the merger occurred mid-year, CoreStates, the acquired corporation (A670), was required to file its own final pre-merger return under its own TIN that was then retired (*see* I.R.C. § 443(a)(1); Treas. Reg. §§ 1.381(b)-1(a)(1), 1.381(b)-1(c); Rev. Rul. 73-526), whereas First Union, as the surviving corporation, filed a return for the full year that reflected its own pre-merger income and the merged corporation's income (*see id.*). Accordingly, even under a broader inquiry into relevant essentials beyond the TIN, pre-merger CoreStates and post-merger First Union were not the same taxpayer. [19]

[19] If the Court finds § 6621(d) ambiguous with regard to what is required for two taxpayers to be the "same," the statute should be strictly construed in the Government's favor. As this Court recognized

(continued…)

D. The CFC erred in viewing a merger as automatically making all participants the "same taxpayer"

The effect of a merger is that the acquired corporation ceases to exist, while the surviving corporation is successor to its assets and liabilities. *See* pp. 34-40, *supra.* There is no general rule that a merger makes the merged corporations the same, much less the "same taxpayer." The federal income tax generally operates on an annual accounting system, based on each unique taxpayer's income and losses for a specified year, and the notion that a later merger can retroactively change one corporate taxpayer to be the same as another is not compatible with that system. Moreover, I.R.C. § 381 makes clear that a

(…continued)
in *Federal Nat'l Mortgage Ass'n v. United States*, 379 F.3d 1303, 1310-11 (Fed. Cir. 2004) (construing uncodified rule for § 6621(d)'s retroactive application), conditions on recovery from the Government restrict the waiver of sovereign immunity and must be strictly construed in the Government's favor. *See United States v. Dalm*, 494 U.S. 596, 602 (1990). Where waivers of sovereign immunity are at issue, this rule controls over other rules of construction, such as the rule favoring a broad interpretation of remedial legislation that the CFC applied. *See Fed. Aviation Admin. v. Cooper*, 132 S. Ct. 1441, 1455 (2012) (strictly construing sovereign-immunity waiver despite remedial purpose of Privacy Act); *Lane v. Pena*, 518 U.S. 187,188 (1996) (applying rule that waivers of sovereign immunity must be strictly construed in interpreting statute protecting the handicapped).

merger results in passing of specified attributes, of which netting is not one, from one taxpayer (the acquired corporation) to another (the surviving corporation). The statute would make no sense – or at least would have no application to mergers – if the surviving corporation became the same taxpayer as the acquired entity upon the merger. But § 381 does apply to mergers. *See* I.R.C. §§ 381, 368; BITTKER & EUSTICE, ¶14.20.

As the CFC noted (A20), § 381(c)'s list of attributes that transfer is not exclusive. *See Philadelphia & Reading Corp. v. United States*, 602 F.2d 338, 343, (Ct. Cl. 1979). Thus, the IRS may rule that the survivor of a statutory merger may use certain additional tax attributes of its predecessors. But § 381's lack of exclusivity does *not* mean that all or nearly all attributes are inherited, so as to make the taxpayers the same. And IRS rulings, adding another specific attribute to the list of particular attributes that one entity can inherit from another, cannot make the two entities the same taxpayer. The CFC erred to the extent it construed language intended to clarify that a single attribute can transfer from one entity to another as providing a general rule that a merger makes all its participants the same taxpayer. (A20-22.)

To the extent the CFC based its holding on informal written determinations prepared by individual IRS attorneys in the form of FSAs or "Chief Counsel Advice" (CCA) (A23-26), its reliance was misplaced. The rulings are not authoritative and are non-precedential. (*See* note 11, *supra* (citing cases)). Moreover, the CFC pointed to only one piece of advice addressing a merger situation in support of its holding, and, as explained above (note 11, *supra*), the analysis of that advice, which pre-dated *Energy East*, is no longer viable. Determinations involving parent-and-subsidiary groups, and holding that affiliated corporate entities are not the same taxpayer, do not establish that *Energy East* and *Magma* are irrelevant to the merger context. To the extent CCAs that do not actually address merger situations assume *arguendo* that merged entities might, in some instances, be the same taxpayer, this assumption (particularly in a non-precedential CCA) is entitled to no weight.

1. Cases pre-dating I.R.C. § 381 do not support the proposition that pre-merger CoreStates and post-merger First Union are the same taxpayer

Wells Fargo relied below on pre-§ 381 case law to support its contention that a merger makes all parties to a merger the same

taxpayer. (A1526-57.) The cases Wells Fargo cited, however, reflected the minority view in case law dealing with transfers of attributes in mergers and acquisitions before Congress enacted § 381 in 1954. These cases thus are of limited relevance, given that Congress enacted § 6621(d) against the backdrop of § 381, which contemplates transfer of attributes from one corporation to another in a merger. Moreover, the majority of cases do not support the view that a state-law merger makes all parties thereto the "same taxpayer."

As Wells Fargo conceded, and as legislative history confirms, case law before § 381's enactment "led to inconsistent results . . . regarding the circumstances under which, and precisely which, tax attributes survived for use by the acquiring company." (A1574); *see* H.R. Rep. 83-1337, at 41 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4066 (new statute was needed because "present practice rest[ed] on court-made law which [wa]s uncertain and frequently contradictory"). Nevertheless, the House Report expresses Congress's understanding that the majority view in 1954 was that the survivor of a statutory merger was a taxpayer separate from the acquired entity, explaining:

> Present law makes no provision for the transfer from one corporation to another, in a tax-free merger or consolidation, of the major tax benefits, privileges, elective rights and obligations which were available to the predecessor. . . . The courts have held, in general, that such tax attributes of a corporation may be preserved only by continuing the corporation's identity. For example, the surviving corporation in a merger is generally entitled only to the tax attributes from its own premerger experience and not from the experience of the other corporations merged. More recently, however, this separate entity rule appears not to have been followed.

Id.

None of the pre-§ 381 cases that addressed transfers of assets to a successor involved statutory language imposing a "same taxpayer" requirement. Nevertheless, in addressing whether certain attributes, such as net operating losses, that a taxpayer could carry forward, could be used by a successor following a reorganization, case law considered whether the entity incurring the losses and the successor claiming them were the "same taxpayer." *New Colonial*, 292 U.S. at 441. *New Colonial*, 292 U.S. 435, the leading case adopting the majority rule that each separate entity is a separate taxpayer, involved circumstances in which assets of a corporation with a loss were transferred to a new corporation, designed to take over the predecessor corporation's business. *Id.* Although the new corporation had the same state of

incorporation, substantially the same shareholders, and the same capital structure, the Court rejected the argument that "'for all practical purposes the new corporation was the same entity as the old one and therefore the same taxpayer.'" *Id.* at 441. Rather, the Court held "in law and in fact the two corporations were not identical but distinct," which was "plainly implied in the transfer of the assets and business from one to the other." *Id.*

New Colonial was widely followed, and many courts treated it as enunciating a "basic concept of taxation" that a "successor corporation is not entitled to deduct the loss of its predecessor even though it had assumed all the liabilities of the predecessor." *Standard Paving Co. v. Commissioner*, 190 F.2d 330, 334 (10th Cir. 1951); *see also Athol Mfg. Co. v. Commissioner*, 54 F.2d 230, 231 (1st Cir. 1931); *Shreveport Prod. & Ref. Co. v. Commissioner*, 71 F.2d 972, 972 (5th Cir. 1934). *New Colonial*'s holding, which came to be known as the separate-entity doctrine, was applied to mergers as well as to other types of reorganizations. For example, in *Standard Silica Co. v. Commissioner*, 22 B.T.A. 97, 98, 101 (1931), the court rejected the argument that state-law merger principles required treating a new corporation created by

merger as the same taxpayer as its predecessors, opining that state law could not "be construed as identifying a taxpayer under the Federal taxing statute or designating the corporation entitled to the benefits thereof." *Id.* at 99; *see also Jones v. Noble Drilling Co., Inc.*, 135 F.2d 721, 724 (10th Cir. 1943); *Overbrook Nat'l Bank of Philadelphia v. Commissioner*, 23 B.T.A. 1390 (1931); *California Casket Co. v. Commissioner*, 19 T.C. 32, 38-39 (1952).

Wells Fargo's argument below that merged corporations become the "same taxpayer" relied on a minority line of authority that had its genesis in *Helvering v. Metropolitan Edison Co.*, 306 U.S. 522 (1939). *Metropolitan Edison* held that a successor could "deduct unamortized bond discount and expense in respect of the obligations of the transferring affiliate." *Id.* at 529. This has been interpreted as establishing that a merger makes the surviving corporation and the absorbed corporation "in substance the same taxpayer." M. Arnopol, *Why Have Chapter 11 Bankruptcies Failed so Miserably? A Reappraisal of Congressional Attempts to Protect a Corporation's Net Operating Losses After Bankruptcy,* 68 NOTRE DAME L. REV. 133, 141 (1992).

But that conclusion is highly debatable. Prior to *Metropolitan Edison*, courts allowed a successor to deduct unamortized bond discount. Their decisions recognized that bond indebtedness transferred by operation of law as a result of a merger, without consideration or adjustment to basis, and the successor had incurred its *own* loss when required to pay the bonds. *E.g., New York Cent. R.R. Co. v. Commissioner*, 79 F.2d 247, 249 (2d Cir. 1935). *Metropolitan Edison* thus can be read as recognizing that the successor suffered its *own* loss when it paid the bonds, as opposed to treating the surviving and the acquired corporations as the same taxpayer. Indeed, the court in *Marion-Reserve Power Co. v. Commissioner*, 1 T.C. 513, 516-18 (1943), reconciled *New Colonial* and *Metropolitan Edison* in this manner, explaining that the loss in *Metropolitan Edison* was "sustained by the consolidated corporation when the bonds mature and are paid." The Tax Court believed that *Metropolitan Edison* should not be read as adopting a rule that "the corporation resulting from a statutory merger or consolidation is, as a matter of law, the same taxable entity as its constituent companies." Rather, the court stated (1 T.C. at 516):

> The argument . . . that the successor in a statutory merger or consolidation is, as matter of law, the same taxable entity as the predecessor, has been uniformly rejected.

Significantly, nothing in *Metropolitan Edison* (which did not mention *New Colonial*) suggests that the Supreme Court was departing from its holding in *New Colonial*.[20]

In *Libson Shops, Inc. v. Koehler*, 353 U.S. 382 (1957) (involving tax years pre-dating § 381), the Supreme Court had an opportunity to clarify the import of *Metropolitan Edison* and resolve any perceived conflict with *New Colonial*. The Court did not directly address the matter, but its opinion belies the notion that a merger automatically makes its participants the same taxpayer. Holding that "a corporation resulting from a merger of 17 separate incorporated businesses" could

[20] Other cases before § 381's enactment allowing carryovers between a predecessor and successor rested on particular statutory language authorizing carryover of an attribute, and thus do not support the CFC's conclusion that, as a general rule, participants in a merger become the same taxpayer. For example, *Stanton Brewery, Inc. v. Commissioner*, 176 F.2d 573 (2d Cir. 1949), and *Koppers Co., Inc. v. United States*, 133 Ct. Cl. 22 (1955), involving carryovers of unused excess-profits credits, relied on specific statutory language that allowed passing the credits to a successor corporation. *See* 26 U.S.C. § 740(a)-(b), 742(a) (1942 ed.). As the *Koppers,* court explained "literal language of the [C]ode allow[ed] the carry-back." 133 Ct. Cl. at 26.

not "carry over and deduct the pre-merger net operating losses of three of its constituent corporations from the post-merger income attributable to other businesses," the Court noted that "the controversy center[ed] on the meaning of 'the taxpayer'" and "whether it can be said that . . . a combination of 16 sales businesses[ ] is 'the taxpayer' having the pre-merger losses of three of those businesses." 353 U.S. at 382, 385. The Court held that in order to offset "a prior year's loss . . . against the current year's income," the income must be "derived from the operation of substantially the same business which produced the loss. Only to that extent is the same 'taxpayer' involved." *Id.* Because the three businesses with pre-merger losses "continued to have losses after the merger," no carryover was available. *Id*. at 388.

Libson Shops' holding that a comparison of the businesses was required to ascertain whether the same taxpayer incurred the loss and the offsetting gains cannot be squared with the CFC's analysis here, which assumed that a merger automatically makes all its participants one and the same.

2. Other statutory schemes do not establish that the merged entities are retroactively the same taxpayer

Contrary to the CFC's conclusion, law under other federal statutes does not support its conclusion that a merged entity and each of its predecessors are the same taxpayer. First, law outside the tax context is hardly determinative of whether entities are the "same taxpayer." And the CFC cited no law establishing that the acquired and surviving entities in a merger generally are the same.

In the Anti-Assignment Act, 31 U.S.C. § 3727, on which the CFC relied (A18), Congress precluded (with certain exceptions) transferring a claim against the Government to another party. In *Seaboard Air Line Ry. v. United States*, 256 U.S. 655, 656-57 (1921), the Court held that this statute did not prevent a successor to a claim after a merger from asserting that claim.[21] But *Seaboard*'s reasoning does not support the CFC's conclusion that all participants in a merger generally become the same entity.

[21] That statute does not use the word "same," and it uses the more general term "party," rather than "taxpayer."

In *Seaboard*, the Court was of the view that Congress would not have wanted to interfere with mergers through an interpretation of the Anti-Assignment Act restricting pursuit of the acquired corporation's claims; absent the Court's giving a measure of flexibility to the statute, that result would follow when, upon the merger, the acquired corporation ceased to exist and no longer could pursue its own claims. The Court's interpretation puts mergers on equal footing with other reorganizations, in which the acquired corporation keeps its separate corporate identity and can pursue its own claims. The Court further observed that earlier cases had recognized exceptions to the Anti-Assignment Act, allowing other assignees to pursue claims where the circumstances were "not within the evil at which the statute aimed." 256 U.S. at 657. The Court reasoned that allowing the surviving corporation to pursue a claim after a merger was no more deleterious than allowing heirs or devisees to pursue a claim, which also was outside the statute's ambit, but which had been allowed. The Court never suggested that the surviving corporation was the "same" as the acquired corporation, noting only that the relationship of the acquiring corporation and acquired corporation was similar to that of other

successors in interest, such as heirs and devisees (which are separate persons from their transferors), for whom the Court had recognized an exception.

In the tax context, the Supreme Court has rejected attempts to infer exceptions of the sort the *Seaboard* Court permitted. *See United States v. Clintwood Elkhorn Mining Co.,* 553 U.S. 1 (2008) (taxpayer could not circumvent prerequisites to refund suit); *United States v. Brockamp*, 519 U.S. 347, 350 (1997) (equitable tolling not permitted). Moreover, the issue on which the Court focused in *Seaboard,* regarding the acquired corporation's claim being lost as result of the merger, does not apply here. Unlike the acquired corporation in *Seaboard*, which would have lost a claim that it had before the merger (because the acquired corporation ceased to exist), neither separate entity loses a right or claim that it had before the merger if netting of the acquired corporation's overpayment and the acquiring corporation's underpayment is not allowed. Rather, the surviving entity here seeks to gain a tax benefit that did not exist before the merger. It makes sense that, in offering the benefit of interest netting, Congress intended to restrict netting to the situation in which the taxpayer with the

underpayment and the taxpayer with the overpayment are the same when the underpayment and overpayment are made. To rule otherwise would create the possibility of encouraging mergers to claim a netting advantage, and Congress has long exercised caution to avoid enacting tax legislation that might create a non-business incentive to combine corporate entities. *See* DOUGLAS A. KAHN, CORPORATE INCOME TAXATION, at 564-65 (West 6th ed. 2009) (prevention of "trading in tax benefits" is among the policies Congress balanced in drawing lines regarding the transfers of attributes permitted under § 381); Lewis T. Barr, *Net Operating Losses and Other Tax Attributes – Sections 381, 382, 383, 384, and 269*, 780-4th Tax Mgmt. at A-23 (BNA 2012) (explaining history of I.R.C. § 382 as a weapon against "'trafficking in loss carryovers,'" enacted in response to an advertisement "touting the advantages of buying a business with [net operating loss] carryovers.")

CONCLUSION

The CFC's decision should be reversed and partial summary judgment should be entered for the Government.

Respectfully submitted,

CAROLINE D. CIRAOLO
Acting Assistant Attorney General

DIANA L. ERBSEN
Deputy Assistant Attorney General

/s/ ELLEN PAGE DELSOLE

GILBERT S. ROTHENBERG	(202) 514-3361
JONATHAN S. COHEN	(202) 514-2970
ELLEN PAGE DELSOLE	(202) 514-8128

Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

MAY 2015

STATUTORY ADDENDUM

Internal Revenue Code (26 U.S.C.):

§ 11. Tax imposed.

(a) Corporations in general.--A tax is hereby imposed for each taxable year on the taxable income of every corporation.

* * *

§ 368. Definitions relating to corporate reorganizations.

(a) Reorganization.--

(1) In general.--For purposes of parts I and II and this part, the term "reorganization" means--

(A) a statutory merger or consolidation;

(B) the acquisition by one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or a part of the voting stock of a corporation which is in control of the acquiring corporation), of stock of another corporation if, immediately after the acquisition, the acquiring corporation has control of such other corporation (whether or not such acquiring corporation had control immediately before the acquisition);

(C) the acquisition by one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or a part of the voting stock of a corporation which is in control of the acquiring corporation), of substantially all of the properties of another corporation, but in determining whether the exchange is solely for stock the assumption by the acquiring corporation of a liability of the other shall be disregarded;

(D) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor, or one or more of its shareholders (including persons who were shareholders immediately before the transfer), or any combination thereof, is in control of the corporation to which the assets are transferred; but only if, in pursuance of the plan, stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354, 355, or 356;

(E) a recapitalization;

(F) a mere change in identity, form, or place of organization of one corporation, however effected; or

(G) a transfer by a corporation of all or part of its assets to another corporation in a Title 11 or similar case; but only if, in pursuance of the plan, stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354, 355, or 356.

(2) Special rules relating to paragraph (1).--

(A) Reorganizations described in both paragraph (1)(C) and paragraph (1)(D).--If a transaction is described in both paragraph (1)(C) and paragraph (1)(D), then, for purposes of this subchapter (other than for purposes of subparagraph (C)), such transaction shall be treated as described only in paragraph (1)(D).

(B) Additional consideration in certain paragraph (1)(C) cases.--If—

(i) one corporation acquires substantially all of the properties of another corporation,

(ii) the acquisition would qualify under paragraph (1)(C) but for the fact that the acquiring corporation exchanges money or other property in addition to voting stock, and

(iii) the acquiring corporation acquires, solely for voting stock described in paragraph (1)(C), property of the other corporation having a fair market value which is at least 80 percent of the fair market value of all of the property of the other corporation,

then such acquisition shall (subject to subparagraph (A) of this paragraph) be treated as qualifying under paragraph (1)(C). Solely for the purpose of determining whether clause (iii) of the preceding sentence applies, the amount of any liability assumed by the acquiring corporation shall be treated as money paid for the property.

(C) Transfers of assets or stock to subsidiaries in certain paragraph (1)(A), (1)(B), (1)(C), and (1)(G) cases.--A transaction otherwise qualifying under paragraph (1)(A), (1)(B), or (1)(C) shall not be disqualified by reason of the fact that part or all of the assets or stock which were acquired in the transaction are transferred to a corporation controlled by the corporation acquiring such assets or stock. A similar rule shall apply to a transaction otherwise qualifying under paragraph (1)(G) where the requirements of subparagraphs (A) and (B) of section 354(b)(1) are met with respect to the acquisition of the assets.

(D) Use of stock of controlling corporation in paragraph (1)(A) and (1)(G) cases.--The acquisition by one corporation, in exchange for stock of a corporation (referred to in this

subparagraph as "controlling corporation") which is in control of the acquiring corporation, of substantially all of the properties of another corporation shall not disqualify a transaction under paragraph (1)(A) or (1)(G) if--

> (i) no stock of the acquiring corporation is used in the transaction, and
>
> (ii) in the case of a transaction under paragraph (1)(A), such transaction would have qualified under paragraph (1)(A) had the merger been into the controlling corporation.

(E) Statutory merger using voting stock of corporation controlling merged corporation.--A transaction otherwise qualifying under paragraph (1)(A) shall not be disqualified by reason of the fact that stock of a corporation (referred to in this subparagraph as the "controlling corporation") which before the merger was in control of the merged corporation is used in the transaction, if--

> (i) after the transaction, the corporation surviving the merger holds substantially all of its properties and of the properties of the merged corporation (other than stock of the controlling corporation distributed in the transaction); and
>
> (ii) in the transaction, former shareholders of the surviving corporation exchanged, for an amount of voting stock of the controlling corporation, an amount of stock in the surviving corporation which constitutes control of such corporation.

(F) Certain transactions involving 2 or more investment companies.--

(i) If immediately before a transaction described in paragraph (1) (other than subparagraph (E) thereof), 2 or more parties to the transaction were investment companies, then the transaction shall not be considered to be a reorganization with respect to any such investment company (and its shareholders and security holders) unless it was a regulated investment company, a real estate investment trust, or a corporation which meets the requirements of clause (ii).

(ii) A corporation meets the requirements of this clause if not more than 25 percent of the value of its total assets is invested in the stock and securities of any one issuer, and not more than 50 percent of the value of its total assets is invested in the stock and securities of 5 or fewer issuers. For purposes of this clause, all members of a controlled group of corporations (within the meaning of section 1563(a)) shall be treated as one issuer. For purposes of this clause, a person holding stock in a regulated investment company, a real estate investment trust, or an investment company which meets the requirements of this clause shall, except as provided in regulations, be treated as holding its proportionate share of the assets held by such company or trust.

(iii) For purposes of this subparagraph the term "investment company" means a regulated investment company, a real estate investment trust, or a corporation 50 percent or more of the value of whose total assets are stock and securities and 80 percent or more of the value of whose total assets are assets held for investment. In making the 50-percent and 80-percent determinations under the preceding sentence, stock and securities in any subsidiary corporation shall be disregarded and the parent corporation shall be

deemed to own its ratable share of the subsidiary's assets, and a corporation shall be considered a subsidiary if the parent owns 50 percent or more of the combined voting power of all classes of stock entitled to vote, or 50 percent or more of the total value of shares of all classes of stock outstanding.

(iv) For purposes of this subparagraph, in determining total assets there shall be excluded cash and cash items (including receivables). Government securities, and, under regulations prescribed by the Secretary, assets acquired (through incurring indebtedness or otherwise) for purposes of meeting the requirements of clause (ii) or ceasing to be an investment company.

(v) This subparagraph shall not apply if the stock of each investment company is owned substantially by the same persons in the same proportions.

(vi) If an investment company which does not meet the requirements of clause (ii) acquires assets of another corporation, clause (i) shall be applied to such investment company and its shareholders and security holders as though its assets had been acquired by such other corporation. If such investment company acquires stock of another corporation in a reorganization described in section 368(a)(1)(B), clause (i) shall be applied to the shareholders of such investment company as though they had exchanged with such other corporation all of their stock in such company for stock having a fair market value equal to the fair market value of their stock of such investment company immediately after the exchange. For purposes of section 1001, the deemed acquisition or exchange referred to in the two preceding sentences shall be treated as a sale or exchange of property by the

corporation and by the shareholders and security holders to which clause (i) is applied.

(vii) For purposes of clauses (ii) and (iii), the term "securities" includes obligations of State and local governments, commodity futures contracts, shares of regulated investment companies and real estate investment trusts, and other investments constituting a security within the meaning of the Investment Company Act of 1940 (15 U.S.C. 80a-2(36)) [FN1].

(G) Distribution requirement for paragraph (1)(C).--

(i) In general.--A transaction shall fail to meet the requirements of paragraph (1)(C) unless the acquired corporation distributes the stock, securities, and other properties it receives, as well as its other properties, in pursuance of the plan of reorganization. For purposes of the preceding sentence, if the acquired corporation is liquidated pursuant to the plan of reorganization, any distribution to its creditors in connection with such liquidation shall be treated as pursuant to the plan of reorganization.

(ii) Exception.--The Secretary may waive the application of clause (i) to any transaction subject to any conditions the Secretary may prescribe.

(H) Special rules for determining whether certain transactions are qualified under paragraph (1)(D).--For purposes of determining whether a transaction qualifies under paragraph (1)(D)--

(i) in the case of a transaction with respect to which the requirements of subparagraphs (A) and (B) of section 354(b)(1) are met, the term "control" has the meaning given such term by section 304(c), and

(ii) in the case of a transaction with respect to which the requirements of section 355 (or so much of section 356 as relates to section 355) are met, the fact that the shareholders of the distributing corporation dispose of part or all of the distributed stock, or the fact that the corporation whose stock was distributed issues additional stock, shall not be taken into account.

(3) Additional rules relating to Title 11 and similar cases.--

(A) Title 11 or similar case defined.--For purposes of this part, the term "Title 11 or similar case" means--

(i) a case under Title 11 of the United States Code, or

(ii) a receivership, foreclosure, or similar proceeding in a Federal or State court.

(B) Transfer of assets in a Title 11 or similar case.--In applying paragraph (1)(G), a transfer of the assets of a corporation shall be treated as made in a Title 11 or similar case if and only if--

(i) any party to the reorganization is under the jurisdiction of the court in such case, and

(ii) the transfer is pursuant to a plan of reorganization approved by the court.

(C) Reorganizations qualifying under paragraph (1)(G) and another provision.--If a transaction would (but for this subparagraph) qualify both--

(i) under subparagraph (G) of paragraph (1), and

(ii) under any other subparagraph of paragraph (1) or under section 332 or 351,

then, for purposes of this subchapter (other than section 357(c)(1)), such transaction shall be treated as qualifying only under subparagraph (G) of paragraph (1).

(D) Agency receivership proceedings which involve financial institutions.-- For purposes of subparagraphs (A) and (B), in the case of a receivership, foreclosure, or similar proceeding before a Federal or State agency involving a financial institution referred to in section 581 or 591, the agency shall be treated as a court.

(E) Application of paragraph (2)(E)(ii).--In the case of a Title 11 or similar case, the requirement of clause (ii) of paragraph (2)(E) shall be treated as met if--

(i) no former shareholder of the surviving corporation received any consideration for his stock, and

(ii) the former creditors of the surviving corporation exchanged, for an amount of voting stock of the controlling corporation, debt of the surviving corporation which had a fair market value equal to 80 percent or more of the total fair market value of the debt of the surviving corporation.

(b) Party to a reorganization.--For purposes of this part, the term "a party to a reorganization" includes--

(1) a corporation resulting from a reorganization, and

(2) both corporations, in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another.

In the case of a reorganization qualifying under paragraph (1)(B) or (1)(C) of subsection (a), if the stock exchanged for the stock or properties is stock of a corporation which is in control of the acquiring corporation, the term "a party to a reorganization" includes the corporation so controlling the acquiring corporation. In the case of a reorganization qualifying under paragraph (1)(A), (1)(B), (1)(C), or (1)(G) of subsection (a) by reason of paragraph (2)(C) of subsection (a), the term "a party to a reorganization" includes the corporation controlling the corporation to which the acquired assets or stock are transferred. In the case of a reorganization qualifying under paragraph (1)(A) or (1)(G) of subsection (a) by reason of paragraph (2)(D) of that subsection, the term "a party to a reorganization" includes the controlling corporation referred to in such paragraph (2)(D). In the case of a reorganization qualifying under subsection (a)(1)(A) by reason of subsection (a)(2)(E), the term "party to a reorganization" includes the controlling corporation referred to in subsection (a)(2)(E).

(c) Control defined.--For purposes of part I (other than section 304), part II, this part, and part V, the term "control" means the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of the corporation.

§ 381. Carryovers in certain corporate acquisitions

(a) General rule.--In the case of the acquisition of assets of a corporation by another corporation-

(1) in a distribution to such other corporation to which section 332 (relating to liquidations of subsidiaries) applies; or

(2) in a transfer to which section 361 (relating to nonrecognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G) of section 368(a)(1),

the acquiring corporation shall succeed to and take into account, as of the close of the day of distribution or transfer, the items described in subsection (c) of the distributor or transferor corporation, subject to the conditions and limitations specified in subsections (b) and (c). For purposes of the preceding sentence, a reorganization shall be treated as meeting the requirements of subparagraph (D) or (G) of section 368(a)(1) only if the requirements of subparagraphs (A) and (B) of section 354(b)(1) are met.

(b) Operating rules.--Except in the case of an acquisition in connection with a reorganization described in subparagraph (F) of section 368(a)(1)—

(1) The taxable year of the distributor or transferor corporation shall end on the date of distribution or transfer.

(2) For purposes of this section, the date of distribution or transfer shall be the day on which the distribution or transfer is completed; except that, under regulations prescribed by the Secretary, the date when substantially all of the property has been distributed or transferred may be used if the distributor or transferor corporation ceases all operations, other than liquidating activities, after such date.

(3) The corporation acquiring property in a distribution or transfer described in subsection (a) shall not be entitled to carry back a net operating loss or a net capital loss for a taxable year ending after the date of distribution or transfer to a taxable year of the distributor or transferor corporation.

(c) Items of the distributor or transferor corporation.--The items referred to in subsection (a) are:

(1) Net operating loss carryovers.--The net operating loss carryovers determined under section 172, subject to the following conditions and limitations:

(A) The taxable year of the acquiring corporation to which the net operating loss carryovers of the distributor or transferor corporation are first carried shall be the first taxable year ending after the date of distribution or transfer.

(B) In determining the net operating loss deduction, the portion of such deduction attributable to the net operating loss carryovers of the distributor or transferor corporation to the first taxable year of the acquiring corporation ending after the date of distribution or transfer shall be limited to an amount which bears the same ratio to the taxable income (determined without regard to a net operating loss deduction) of the acquiring corporation in such taxable year as the number of days in the taxable year after the date of distribution or transfer bears to the total number of days in the taxable year.

(C) For the purpose of determining the amount of the net operating loss carryovers under section 172(b)(2), a net operating loss for a taxable year (hereinafter in this subparagraph referred to as the "loss year") of a distributor or transferor corporation which ends on or before the end of a loss year of the acquiring corporation shall be considered to be a net operating loss for a year prior to such loss year of the acquiring corporation. For the same purpose, the taxable income for a "prior taxable year" (as the term is used in section 172(b)(2)) shall be computed as provided in such section; except that, if the date of distribution or transfer is on a day other than the last day of a taxable year of the acquiring corporation—

> (i) such taxable year shall (for the purpose of this subparagraph only) be considered to be 2 taxable years (hereinafter in this subparagraph referred to as the "pre-acquisition part year" and the "post-acquisition part year");

(ii) the pre-acquisition part year shall begin on the same day as such taxable year begins and shall end on the date of distribution or transfer;

(iii) the post-acquisition part year shall begin on the day following the date of distribution or transfer and shall end on the same day as the end of such taxable year;

(iv) the taxable income for such taxable year (computed with the modifications specified in section 172(b)(2)(A) but without a net operating loss deduction) shall be divided between the pre-acquisition part year and the post-acquisition part year in proportion to the number of days in each;

(v) the net operating loss deduction for the pre-acquisition part year shall be determined as provided in section 172(b)(2)(B), but without regard to a net operating loss year of the distributor or transferor corporation; and

(vi) the net operating loss deduction for the post-acquisition part year shall be determined as provided in section 172(b)(2)(B).

(2) Earnings and profits.--In the case of a distribution or transfer described in subsection (a)—

(A) the earnings and profits or deficit in earnings and profits, as the case may be, of the distributor or transferor corporation shall, subject to subparagraph (B), be deemed to have been received or incurred by the acquiring corporation as of the close of the date of the distribution or transfer; and

(B) a deficit in earnings and profits of the distributor, transferor, or acquiring corporation shall be used only to

offset earnings and profits accumulated after the date of transfer. For this purpose, the earnings and profits for the taxable year of the acquiring corporation in which the distribution or transfer occurs shall be deemed to have been accumulated after such distribution or transfer in an amount which bears the same ratio to the undistributed earnings and profits of the acquiring corporation for such taxable year (computed without regard to any earnings and profits received from the distributor or transferor corporation, as described in subparagraph (A) of this paragraph) as the number of days in the taxable year after the date of distribution or transfer bears to the total number of days in the taxable year.

(3) Capital loss carryover.--The capital loss carryover determined under section 1212, subject to the following conditions and limitations:

(A) The taxable year of the acquiring corporation to which the capital loss carryover of the distributor or transferor corporation is first carried shall be the first taxable year ending after the date of distribution or transfer.

(B) The capital loss carryover shall be a short-term capital loss in the taxable year determined under subparagraph (A) but shall be limited to an amount which bears the same ratio to the capital gain net income (determined without regard to a short-term capital loss attributable to capital loss carryover), if any, of the acquiring corporation in such taxable year as the number of days in the taxable year after the date of distribution or transfer bears to the total number of days in the taxable year.

(C) For purposes of determining the amount of such capital loss carryover to taxable years following the taxable year determined under subparagraph (A), the capital gain net income in the taxable year determined under subparagraph

(A) shall be considered to be an amount equal to the amount determined under subparagraph (B).

(4) Method of accounting.--The acquiring corporation shall use the method of accounting used by the distributor or transferor corporation on the date of distribution or transfer unless different methods were used by several distributor or transferor corporations or by a distributor or transferor corporation and the acquiring corporation. If different methods were used, the acquiring corporation shall use the method or combination of methods of computing taxable income adopted pursuant to regulations prescribed by the Secretary.

(5) Inventories.--In any case in which inventories are received by the acquiring corporation, such inventories shall be taken by such corporation (in determining its income) on the same basis on which such inventories were taken by the distributor or transferor corporation, unless different methods were used by several distributor or transferor corporations or by a distributor or transferor corporation and the acquiring corporation. If different methods were used, the acquiring corporation shall use the method or combination of methods of taking inventory adopted pursuant to regulations prescribed by the Secretary.

(6) Method of computing depreciation allowance.--The acquiring corporation shall be treated as the distributor or transferor corporation for purposes of computing the depreciation allowance under sections 167 and 168 on property acquired in a distribution or transfer with respect to so much of the basis in the hands of the acquiring corporation as does not exceed the adjusted basis in the hands of the distributor or transferor corporation.

[(7) Repealed. June 15, 1955, c. 143, § 2(1), 69 Stat. 134]

(8) Installment method.--If the acquiring corporation acquires installment obligations (the income from which the distributor or transferor corporation reports on the installment

basis under section 453) the acquiring corporation shall, for purposes of section 453, be treated as if it were the distributor or transferor corporation.

(9) Amortization of bond discount or premium.--If the acquiring corporation assumes liability for bonds of the distributor or transferor corporation issued at a discount or premium, the acquiring corporation shall be treated as the distributor or transferor corporation after the date of distribution or transfer for purposes of determining the amount of amortization allowable or includible with respect to such discount or premium.

(10) Treatment of certain mining development and exploration expenses of distributor or transferor corporation.--The acquiring corporation shall be entitled to deduct, as if it were the distributor or transferor corporation, expenses deferred under section 616 (relating to certain development expenditures) if the distributor or transferor corporation has so elected.

(11) Contributions to pension plans, employees’ annuity plans, and stock bonus and profit-sharing plans.--The acquiring corporation shall be considered to be the distributor or transferor corporation after the date of distribution or transfer for the purpose of determining the amounts deductible under section 404 with respect to pension plans, employees' annuity plans, and stock bonus and profit-sharing plans.

(12) Recovery of tax benefit items.--If the acquiring corporation is entitled to the recovery of any amounts previously deducted by (or allowable as credits to) the distributor or transferor corporation, the acquiring corporation shall succeed to the treatment under section 111 which would apply to such amounts in the hands of the distributor or transferor corporation.

(13) Involuntary conversions under section 1033.--The acquiring corporation shall be treated as the distributor or

transferor corporation after the date of distribution or transfer for purposes of applying section 1033.

(14) Dividend carryover to personal holding company.--The dividend carryover (described in section 564) to taxable years ending after the date of distribution or transfer.

[(15) Repealed. Pub.L. 101-508, Title XI, § 11801(c)(10)(A), Nov. 5, 1990, 104 Stat. 1388-526]

(16) Certain obligations of distributor or transferor corporation.--If the acquiring corporation—

(A) assumes an obligation of the distributor or transferor corporation which, after the date of the distribution or transfer, gives rise to a liability, and

(B) such liability, if paid or accrued by the distributor or transferor corporation, would have been deductible in computing its taxable income,

the acquiring corporation shall be entitled to deduct such items when paid or accrued, as the case may be, as if such corporation were the distributor or transferor corporation. A corporation which would have been an acquiring corporation under this section if the date of distribution or transfer had occurred on or after the effective date of the provisions of this subchapter applicable to a liquidation or reorganization, as the case may be, shall be entitled, even though the date of distribution or transfer occurred before such effective date, to apply this paragraph with respect to amounts paid or accrued in taxable years beginning after December 31, 1953, on account of such obligations of the distributor or transferor corporation. This paragraph shall not apply if such obligations are reflected in the amount of stock, securities, or property transferred by the acquiring corporation to the transferor corporation for the property of the transferor corporation.

(17) Deficiency dividend of personal holding company.--If the acquiring corporation pays a deficiency dividend (as defined in section 547(d)) with respect to the distributor or transferor corporation, such distributor or transferor corporation shall, with respect to such payments, be entitled to the deficiency dividend deduction provided in section 547.

(18) Percentage depletion on extraction of ores or minerals from the waste or residue of prior mining.--The acquiring corporation shall be considered to be the distributor or transferor corporation for the purpose of determining the applicability of section 613(c)(3) (relating to extraction of ores or minerals from the ground).

(19) Charitable contributions in excess of prior years' limitations.--Contributions made in the taxable year ending on the date of distribution or transfer and the 4 prior taxable years by the distributor or transferor corporation in excess of the amount deductible under section 170(b) (2) for such taxable years shall be deductible by the acquiring corporation for its taxable years which begin after the date of distribution or transfer, subject to the limitations imposed in section 170(b)(2). In applying the preceding sentence, each taxable year of the distributor or transferor corporation beginning on or before the date of distribution or transfer shall be treated as a prior taxable year with reference to the acquiring corporation's taxable years beginning after such date.

[(20) Repealed. Pub.L. 94-455, Title XIX, § 1901(a) (54), Oct. 4, 1976, 90 Stat. 1773]

[(21) Repealed. Pub.L. 94-455, Title XIX, § 1901(b) (16), Oct. 4, 1976, 90 Stat. 1796]

(22) Successor insurance company.--If the acquiring corporation is an insurance company taxable under subchapter L,

there shall be taken into account (to the extent proper to carry out the purposes of this section and of subchapter L, and under such regulations as may be prescribed by the Secretary) the items required to be taken into account for purposes of subchapter L in respect of the distributor or transferor corporation.

(23) Deficiency dividend of regulated investment company or real estate investment trust.--If the acquiring corporation pays a deficiency dividend (as defined in section 860(f)) with respect to the distributor or transferor corporation, such distributor or transferor corporation shall, with respect to such payments, be entitled to the deficiency dividend deduction provided in section 860.

(24) Credit under section 38.--The acquiring corporation shall take into account (to the extent proper to carry out the purposes of this section and section 38, and under such regulations as may be prescribed by the Secretary) the items required to be taken into account for purposes of section 38 in respect of the distributor or transferor corporation.

(25) Credit under section 53.--The acquiring corporation shall take into account (to the extent proper to carry out the purposes of this section and section 53, and under such regulations as may be prescribed by the Secretary) the items required to be taken into account for purposes of section 53 in respect of the distributor or transferor corporation.

(26) Enterprise zone provisions.--The acquiring corporation shall take into account (to the extent proper to carry out the purposes of this section and subchapter U, and under such regulations as may be prescribed by the Secretary) the items required to be taken into account for purposes of subchapter U in respect of the distributor or transferor corporation.

(d) Operations loss carrybacks and carryovers of life insurance companies.--

For application of this part to operations loss carrybacks and carryovers of life insurance companies, see section 810.

§ 443. Returns for a period of less than 12 months.

(a) Returns for short period.--A return for a period of less than 12 months (referred to in this section as "short period") shall be made under any of the following circumstances:

(1) Change of annual accounting period.--When the taxpayer, with the approval of the Secretary, changes his annual accounting period. In such a case, the return shall be made for the short period beginning on the day after the close of the former taxable year and ending at the close of the day before the day designated as the first day of the new taxable year.

(2) Taxpayer not in existence for entire taxable year.--When the taxpayer is in existence during only part of what would otherwise be his taxable year.

* * *

§ 6012. Persons required to make returns of income.

(a) General rule.--Returns with respect to income taxes under subtitle A shall be made by the following:

* * *

(2) Every corporation subject to taxation under subtitle A;

* * *

§ 6110. Public inspection of written determinations.

(a) General rule.--Except as otherwise provided in this section, the text of any written determination and any background file document relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe.

(b) Definitions.--For purposes of this section--

(1) Written determination.--

(A) In general.--The term "written determination" means a ruling, determination letter, technical advice memorandum, or Chief Counsel advice.

(B) Exceptions.--Such term shall not include any matter referred to in subparagraph (C) or (D) of section 6103(b)(2).

* * *

(k) Special provisions.--

* * *

(3) Precedential status.--Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent. The preceding sentence shall not apply to change the precedential status (if any) of written determinations with regard to taxes imposed by subtitle D of this title.

§ 6402. Authority to make credits or refunds

(a) General rule.--In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), (e), and (f) [footnote omitted] refund any balance to such person.

* * *

§ 6601. Interest on underpayment, nonpayment, or extensions of time for payment, of tax

(a) General rule.--If any amount of tax imposed by this title (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the underpayment rate established under section 6621 shall be paid for the period from such last date to the date paid.

* * *

(e) Applicable rules.--Except as otherwise provided in this title--

> (1) Interest treated as tax.--Interest prescribed under this section on any tax shall be paid upon notice and demand, and shall be assessed, collected, and paid in the same manner as taxes. Any reference in this title (except subchapter B of chapter 63, relating to deficiency procedures) to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax.

* * *

§ 6611. Interest on overpayments.

(a) Rate.--Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.

* * *

§ 6621. Determination of rate of interest

* * *

(d) Elimination of interest on overlapping periods of tax overpayments and underpayments.--To the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer of tax imposed by this title, the net rate of interest under this section on such amounts shall be zero for such period.

Treasury Regulations (26 C.F.R.):

§ 1.381(b)–1. Operating rules applicable to carryovers in certain corporate acquisitions.

(a) Closing of taxable year—

(1) In general. Except in the case of certain reorganizations qualifying under section 368(a)(1)(F), the taxable year of the distributor or transferor corporation shall end with the close of the date of distribution or transfer. With regard to the closing of the taxable year of the transferor corporation in certain reorganizations under section 368(a)(1)(F) involving a foreign corporation after December 31, 1986, see §§ 1.367(a)–1T(e) and 1.367(b)–2(f).

(2) Reorganizations under section 368(a)(1)(F). In the case of a reorganization qualifying under section 368(a)(1)(F) (whether or not such reorganization also qualifies under any other provision of section 368(a)(1)), the acquiring corporation shall be treated (for purposes of section 381) just as the transferor corporation would have been treated if there had been no reorganization. Thus, the taxable year of the transferor corporation shall not end on the date of transfer merely because of the transfer; a net operating loss of the acquiring corporation for any taxable year ending after the date of transfer shall be carried back in accordance with section 172(b) in computing the taxable income of the transferor

corporation for a taxable year ending before the date of transfer; and the tax attributes of the transferor corporation enumerated in section 381(c) shall be taken into account by the acquiring corporation as if there had been no reorganization.

* * *

(c) Return of distributor or transferor corporation. The distributor or transferor corporation shall file an income tax return for the taxable year ending with the date of distribution or transfer described in paragraph (b) of this section. If the distributor or transferor corporation remains in existence after such date of distribution or transfer, it shall file an income tax return for the taxable year beginning on the day following the date of distribution or transfer and ending with the date on which the distributor or transferor corporation's taxable year would have ended if there had been no distribution or transfer.

* * *

Delaware Code Annotated, Title 8, Corporations.

§ 259. Status, rights, liabilities, of constituent and surviving or resulting corporations following merger or consolidation.

(a) When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into 1 of such corporations, as the case may be, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated; and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in

action or belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger or consolidation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

(b) In the case of a merger of banks or trust companies, without any order or action on the part of any court or otherwise, all appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, trustee of estates of persons mentally ill and in every other fiduciary capacity, shall be automatically vested in the corporation resulting from or surviving such merger; provided, however, that any party in interest shall have the right to apply to an appropriate court or tribunal for a determination as to whether the surviving corporation shall continue to serve in the same fiduciary capacity as the merged corporation, or whether a new and different fiduciary should be appointed.

ADDENDUM

ADDENDUM

Wells Fargo & Company v. United States
(Fed. Cir. – No. 15-5059)

Document **Page**

In the United States Court of Federal Claims

No. 11-808T
(Filed: June 27, 2014)

WELLS FARGO & COMPANY, Plaintiff, v. THE UNITED STATES, Defendant.	)	Tax; Interest Netting under 26 U.S.C. § 6621(d); "Same Taxpayer"; Merged Corporations

Gerald A. Kafka, Washington, DC, with whom were *Rita A. Cavanagh* and *Chad D. Nariello*, of counsel, and *Andrew T. Gardner*, Minneapolis, MN, tax counsel, for plaintiff.

Jason Bergmann, Tax Division, United States Department of Justice, Washington, DC, with whom were *Kathryn Keneally*, Assistant Attorney General, and *David I. Pincus*, Chief, Court of Federal Claims Section, for defendant.

O P I N I O N

FIRESTONE, *Judge*.

This case presents an issue of first impression regarding the application of Internal Revenue Code ("I.R.C." or "Code") § 6621(d) to corporations that have acquired other corporations or been acquired through a statutory merger. It concerns whether plaintiff, Wells Fargo & Company ("Wells Fargo"), is entitled to net the interest paid on certain tax underpayments owed by Wells Fargo or its predecessor, First Union Corporation ("First Union"), with the interest owed by the United States to Wells Fargo on

overpayments made by First Union or other companies acquired by Wells Fargo through various corporate mergers. The case turns on the definition of the term "same taxpayer" in § 6621(d).[1] Section 6621(d) was enacted in 1998 to allow for "global netting" on interest rates for tax overpayments and tax underpayments by the "same taxpayer" in order to address the disparity between the higher interest rate imposed on tax underpayments and the lower interest rate applied when the government pays a refund on tax overpayments.[2] The statute provides that the interest rates may be netted to zero when there are overlapping overpayments and underpayments by the "same taxpayer"

---

[1] The provision states:

> Elimination of interest on overlapping periods of tax overpayments and underpayments.--To the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer of tax imposed by this title, the net rate of interest under this section on such amounts shall be zero for such period.

I.R.C. § 6621(d).

[2] The purpose of § 6621(d) is addressed in detail in Magma Power Co. v. United States, 101 Fed. Cl. 562 (2011). In brief, interest is payable on tax deficiencies under I.R.C. § 6601 and is allowed on overpayments under I.R.C. § 6611. Under the Code, taxpayers pay interest at a higher rate on tax underpayments than the interest they receive from the IRS on tax overpayments. Because of this differential, a taxpayer that underpaid some taxes and overpaid others could end up owing interest even where the taxes themselves netted to zero. Prior to § 6621(d)'s enactment, this imbalance could only be corrected through discretionary offsetting under I.R.C. § 6402, in the limited circumstances where the underlying tax obligations were still unresolved and the interest can be calculated before any final tax payment is made. Section 6621(d) permits taxpayers to correct the interest differential by allowing for a refund of the extra interest payment even if one or both of the tax and interest payments have been made and the overlapping period of tax overpayment and tax underpayment is thus not identified until after the tax payment.

during the same period.[3] Plaintiff argues that the term "same taxpayer" includes both predecessors of the surviving corporation in a statutory merger and that, as a result, the statute allows for interest netting regardless of whether the overlapping overpayments and underpayments involve corporations that were separate until the merger is carried out. According to plaintiff, following a merger, the entities become one and the same as a matter of law and thus become the "same" for purposes of interest netting. The government argues that the phrase "same taxpayer" is narrower than plaintiff argues. The government contends that taxpayers should only be considered the "same" for purposes § 6621(d) if they had the same Taxpayer Identification Number ("TIN") at the time of the initial tax overpayment or underpayment, regardless of whether the entities later merged and the surviving entity is now a single entity for tax purposes.

Now pending before the court are the parties' cross motions for partial summary judgment under Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC") with regard to the proper interpretation of "same taxpayer" in the context of three separate test claims arising from specific Wells Fargo mergers, representing the three varieties of transaction that occur in this case.[4] Oral argument was held on June 6, 2014. For the reasons set forth below, the court **GRANTS** plaintiff's motion for partial summary judgment and **DENIES** the government's cross-motion for partial summary judgment.

---

[3] There is no dispute between the parties that for purposes of this motion, the plaintiff has satisfied the requirement that the tax and interest payments cover overlapping periods. The issue on this motion is whether the tax and interest payments involve the "same taxpayer."

[4] The facts of these test claims are discussed infra.

I. BACKGROUND

The relevant facts are undisputed. The claims in this case arise from seven mergers which culminated in the formation of Wells Fargo as it currently exists. Consol. Stmt. of Uncont. Facts ¶ 4. These mergers can be divided into two lines: the Wells Fargo line and the Wachovia line.

a. Wells Fargo Line of Mergers

In 1998, Norwest Corporation ("Norwest") acquired Wells Fargo & Company ("Old Wells Fargo") through a forward triangular merger under I.R.C. §§ 368(a)(1)(A), 368(a)(2)(D).[5] Id. at ¶¶ 8, 10. The board of directors approved a merger agreement on June 7, 1998, which was subsequently approved by the shareholders. Id. at ¶¶ 8-9. Old Wells Fargo merged into WFC Holdings, Corp. ("WFC"), a subsidiary of Norwest organized for purposes of the merger. Id. at ¶ 10. As a result, Norwest and WFC survived the merger, while Old Wells Fargo's separate existence was terminated; Norwest changed its name to Wells Fargo & Company. Id. at ¶¶ 11-12, 15. WFC

---

[5] Section 368(a)(1)(A) defines "a statutory merger or consolidation" as a type of reorganization. I.R.C. § 368(a)(1)(A). Section 368(a)(2)(D) sets forth the procedure for a reorganization using a corporation's stock:

> The acquisition by one corporation, in exchange for stock of a corporation (referred to in this subparagraph as "controlling corporation") which is in control of the acquiring corporation, of substantially all of the properties of another corporation shall not disqualify a transaction under paragraph (1)(A) . . . if--
>
> (i) no stock of the acquiring corporation is used in the transaction, and
>
> (ii) in the case of a transaction under paragraph (1)(A), such transaction would have qualified under paragraph (1)(A) had the merger been into the controlling corporation.

I.R.C. § 368(a)(2)(D).

acquired the assets and assumed the liabilities of Old Wells Fargo, and became the common parent of the affiliated corporations that were previously members of Old Wells Fargo's consolidated group. Id. at ¶¶ 13-14.

In 2008, Wells Fargo and Wachovia Corporation ("New Wachovia") carried out a merger under I.R.C. § 368(a)(1)(A). Id. at ¶¶ 16, 18, 20. The board of directors approved a merger agreement on October 3, 2008, which was subsequently approved by the shareholders. Id. at ¶¶ 18-19. Wells Fargo survived the merger, while New Wachovia's separate existence was terminated. Id. at ¶¶ 21-22. Wells Fargo acquired the assets and assumed the liabilities of New Wachovia, and became the common parent of the affiliated corporations that were previously members of New Wachovia's consolidated group. Id. at ¶¶ 23-24.

b. Wachovia Line of Mergers

In 1996, First Union acquired First Fidelity Bancorporation ("Fidelity") through a forward triangular merger under I.R.C. §§ 368(a)(1)(A), 368(a)(2)(D). Id. at ¶¶ 25, 29. The board of directors approved a merger agreement on December 22, 1995, which was subsequently approved by the shareholders. Id. at ¶¶ 27-28. Fidelity merged into First Union Corporation of New Jersey ("FCNJ"), a subsidiary of First Union organized for purposes of the merger. Id. at ¶ 29. As a result, First Union and FCNJ survived the merger, while Fidelity's separate existence was terminated. Id. at ¶¶ 30-31. FCNJ acquired the assets and assumed the liabilities of Fidelity, and became the common parent of the affiliated corporations that were previously members of Fidelity's consolidated group. Id. at ¶¶ 32-33.

In 1998, FCNJ and First Union carried out a merger under I.R.C. § 368(a)(1)(A). Id. at ¶¶ 34, 37. First Union held 100% of the stock of FCNJ. Id. at 35. The board of directors approved a merger plan on February 11, 1998. Id. at ¶ 36. First Union survived the merger, while FCNJ's separate existence was terminated. Id. at ¶¶ 38-39. First Union acquired the assets and assumed the liabilities of FCNJ. Id. at ¶¶ 40-41.

In 1997, First Union and Signet Banking Corporation ("Signet") carried out a merger under I.R.C. § 368(a)(1)(A). Id. at ¶¶ 42, 46. The board of directors approved a merger agreement on July 18, 1997, which was subsequently approved by the shareholders. Id. at ¶¶ 44-45. First Union survived the merger, while Signet's separate existence was terminated. Id. at ¶¶ 47-48. First Union acquired the assets and assumed the liabilities of Signet, and became the common parent of the affiliated corporations that were previously members of Signet's consolidated group. Id. at ¶¶ 49-50.

In 1998, First Union and CoreStates Financial Corporation ("CoreStates") carried out a merger under I.R.C. § 368(a)(1)(A). Id. at ¶¶ 51, 55. The board of directors approved a merger agreement on November 18, 1997, which was subsequently approved by the shareholders. Id. at ¶¶ 53-54. First Union survived the merger, while CoreStates's separate existence was terminated. Id. at ¶¶ 56-57. First Union acquired the assets and assumed the liabilities of CoreStates, and became the common parent of the affiliated corporations that were previously members of CoreStates's consolidated group. Id. at ¶¶ 58-59.

In 2001, First Union and Wachovia Corporation ("Old Wachovia") carried out a merger under I.R.C. § 368(a)(1)(A). Id. at ¶¶ 60, 64. The board of directors approved a

merger agreement on April 15, 2001, which was subsequently approved by the shareholders. Id. at ¶¶ 62-63. First Union survived the merger, while Old Wachovia's separate existence was terminated. Id. at ¶¶ 65-66. First Union acquired the assets and assumed the liabilities of Old Wachovia, and became the common parent of the affiliated corporations that were previously members of Old Wachovia's consolidated group. Id. at ¶¶ 67-68. First Union changed its name to Wachovia Corporation. Id. at ¶ 69. As noted above, Wachovia and Wells Fargo merged in 2008.

c. Procedural History

Beginning in 2009, Wells Fargo filed three administrative claims with the IRS seeking, among other things, refunds based on interest netting between interest paid on tax underpayments and interest paid on tax overpayments, relying on § 6621(d). Id. at 70. Specifically, on December 15, 2010, Wells Fargo filed an interest claim related to New Wachovia and Old Wachovia. Id. at 75. On June 9, 2011, Wells Fargo filed an interest claim related to Wells Fargo. Id. at 76. On November 17, 2011, Wells Fargo filed an interest claim related to Wells Fargo, Signet, New Wachovia, and Old Wachovia. Id. at 77. These claims were not accepted. The IRS did, however, allow for interest netting on certain other claims.[6]

[6] In addition to the claims at issue in this case, plaintiff has filed other claims with the IRS seeking to net interest pursuant to § 6621(d). Def.'s Notice of Add'l Facts, Ex. 1 (Decl. of Andrew T. Gardner), ¶ 6, ECF No. 66. In 2008, plaintiff filed administrative claims seeking refunds based on situations similar to those at issue in this case, as discussed below: (1) netting between a 1997 tax underpayment by Old Wachovia and a 1987 overpayment by First Union; (2) netting between a 1997 tax underpayment by First Union and a 1987 overpayment by First Union; and (3) netting between a 1997 underpayment by First Union and a 1995 overpayment by First Fidelity. Id. at ¶¶ 7-9. The IRS allowed interest netting between these payments on June 10, 2010. Id. The government contends that the IRS legally erred in allowing interest netting for

On December 1, 2011, plaintiff timely filed a complaint in this court. After the government moved to dismiss some of plaintiff's claims under 28 U.S.C. § 1500 based on claims pending in district court,[7] plaintiff stipulated to their dismissal. See Order Dismissing Claims, Oct. 23, 2012, ECF No. 34. On October 22, 2012, plaintiff filed an amended complaint containing 64 separate claims for a refund on overpayments based on the application of the interest netting authorized under § 6621(d). Thereafter, the parties identified three test claims, based on scenarios representing three different merger transactions, to test the application of § 6621(d):

Scenario One: This scenario is intended to address whether interest netting is allowed in connection with underpayments and overpayments between a pre-merger acquiring corporation and a pre-merger acquired corporation. It involves underpayment interest on First Union's 1999 income tax account against overpayment interest on Old Wachovia's 1993 income tax account.

Scenario Two: This scenario is intended to address whether interest netting is allowed in connection with underpayments and overpayments between a pre-merger acquiring corporation and the post-merger surviving corporation. It involves underpayment interest on First Union's 1999 income tax account against overpayment interest on First Union's 1993 income tax account.

---

those claims on the grounds that they preceded a federal circuit decision which the government contends dictates a different outcome. See infra page 19.

[7] That prior litigation is still pending in the United States District Court for the District of Minnesota.

Scenario Three: This scenario is intended to address whether interest netting is allowed between the pre-merger acquired corporation and the post-merger surviving corporation. It involves underpayment interest on First Union's 1999 income tax account against overpayment interest on CoreStates's 1992 income tax account.

II. STANDARD OF REVIEW

Under RCFC 56, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). This case is especially appropriate for summary judgment because the material facts are not in dispute and the parties have presented a purely legal question for the court to resolve. RCFC 56(a).

III. DISCUSSION

As discussed above, because interest netting is allowed by the "same taxpayer," the dispute in this case centers on the meaning of "same taxpayer" under § 6621(d) in the context of a statutory merger. Under the government's definition of the phrase, a taxpayer is only the "same taxpayer" if and only if, at the time of the overlapping tax payments, both taxpayers share the same TIN. Because an acquired company never has the same TIN as the acquiring or surviving corporation, the government argues, interest on a tax underpayment or overpayment attributable to income from entities later acquired by Wells Fargo cannot be netted with interest on overpayments or underpayments attributable to Wells Fargo.

Plaintiff argues that § 6621(d) allows for interest netting among merged entities on the grounds that, following a merger, the acquiring corporation becomes one and the

same with the corporation it acquired by operation of law. In such circumstances, plaintiff argues, it shares the history of both the acquired and acquiring entity. According to Wells Fargo, the government's interpretation of "same taxpayer" is legally incorrect because it fails to take into account the legal realities of corporations following mergers, including the obligation of the surviving corporation to assume the tax liabilities of the acquired entity. Plaintiff further argues that, following a statutory merger, the acquired entity ceases to exist, along with its TIN, and thus at the time a taxpayer seeks interest netting following a merger, the TIN no longer serves as an adequate representation of taxpayers for purposes of determining "same taxpayer" status.[8] It is with this understanding of the parties' arguments that the court turns to its analysis.

a. The Statutory Language and Legislative History Do Not Provide a Plain Meaning for "Same Taxpayer"

As with any case involving a question of statutory interpretation or construction, we begin with the language of the statute itself. Duncan v. Walker, 533 U.S. 167, 172 (2001). Here, as noted above, § 6621(d), provides:

> To the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and

---

[8] As discussed later in this opinion, plaintiff acknowledges that, as a matter of law, a surviving corporation does not acquire certain tax attributes of an acquired corporation while other attributes are authorized under I.R.C. § 381. Interest netting is not explicitly identified in the Code as a tax attribute that survives acquisition of a corporation. The government argues that interest netting is a tax attribute of an acquired corporation and unless expressly permitted is not allowed. Plaintiff argues that interest netting is instead a calculation related to interest itself rather than a separate attribute, and further argues that interest is treated as a tax. Thus, according to plaintiff, interest netting is not a tax attribute of the acquired corporation. As discussed infra, tax attributes are typically tax benefits—such as deductions—authorized by the Code.

> overpayments <u>by the same taxpayer</u> of tax imposed by this title, the net rate of interest under this section on such amounts shall be zero for such period.

I.R.C. § 6621(d) (emphasis added). "Same taxpayer" is not defined in § 6621(d), nor is it defined elsewhere in the IRC. In addition, there are no Treasury regulations that define "same taxpayer." The government nonetheless argues that the plain language of the text requires the use of the TIN to determine whether parties are the "same taxpayer." Specifically, the government argues that its interpretation is compelled by the placement of the phrase "by the same taxpayer" immediately following "equivalent underpayments and overpayments" in § 6621(d). According to the government, the statute creates a temporal requirement which mandates that the taxpayer seeking to engage in interest netting be the same at the time that the payments were made, and that this requirement can only be satisfied by having the same TIN at the time the of the payments.

Plaintiff argues that any temporal requirement is met once a statutory merger is completed. Specifically, plaintiff argues that any temporal requirement is satisfied once the corporations become the same legal entity by operation of law by completing the statutory merger. Thus, plaintiff contends that where, as here, interest on overpayments and underpayments for the same period were identified and are either owed or refunded to the post-merger corporation, the corporation liable for underpayment interest is, in fact, the same corporation entitled to the overpayment interest.

The parties also disagree on the need to look to the legislative history in order to resolve this dispute. The government argues that resorting to the legislative history is not necessary because the statutory text's meaning is plain. Plaintiff argues that the

legislative history supports its view that the statute must be given a liberal construction as a remedial statute. As noted by the parties, the term “same taxpayer” is not defined in the statute and is not self-defining. Accordingly, the court finds that the meaning is not plain and turns to the legislative history for guidance.

A review of the legislative history reveals that Congress intended for § 6621(d) to be remedial in nature. As such, the statute must be construed broadly. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (“In addition, we are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.”). The legislative history does not offer any insight into the meaning of the phrase “same taxpayer,” but does provide some indication of Congress’s purpose in passing the legislation. First, the legislative history makes clear that Congress intended the provision to provide fairness for taxpayers. H.R. Rep. No. 105-364, pt. 1, at 63-64 (1997) (“taxpayers should be charged interest only on the amount they actually owe, taking into account overpayments and underpayments from all open years.”); S. Rep. No. 105-174 at 61 (1998). Second, the legislative history also makes clear that Congress was aware that large corporations, like plaintiff, would be the primary beneficiaries of the provision, because only large corporations such as plaintiff would likely have multiple open years with the IRS.

Having considered the parties arguments, the court finds that the plain language of § 6621(d) does not answer the question presented because the phrase “same taxpayer” is not self-defining and the temporal relationship identified by the government does not aid in defining the term in the context of statutory mergers. Plaintiff correctly notes that

Case: 15-5059 Document: 72 Page: 124 Filed: 06/27/2016

"same taxpayer" is a legal term that relies on an examination of the legal status of the taxpayer that is seeking to net interest. In addition, a review of the legislative history does not resolve the question presented.[9] Without a discussion of the meaning of "same taxpayer" in the legislative history, it is of limited help in defining the term. As a result, the court turns to the definitions proposed by the parties.

b. Corporations formed through statutory mergers, in contrast to members of affiliated groups, are the "same taxpayer" for purposes of § 6621(d).

The government argues that the legal right to net interest depends on the whether the overpayment and underpayment were made by the taxpayer with the same TIN at the time of the payments. This argument is derived in large part from two cases: Energy E. Corp. v. United States, 645 F.3d 1358 (Fed. Cir. 2011), and Magma Power Co. v. United States, 101 Fed. Cl. 562 (2011). In Energy East, the Federal Circuit held that a parent corporation and subsidiary that were not affiliated at the time they each made tax payments could not net interest under § 6621(d) in their consolidated return. The meaning of "same taxpayer" was not before the court and the court focused instead on the issue of when the initial tax payments were made. The holding was expanded by this court in Magma Power, where the definition of "same taxpayer" was at issue. In Magma

[9] The government argues that § 6621(d) must be strictly construed in its favor because it amounts to a waiver of sovereign immunity. The court finds the government's reference to sovereign immunity to be misplaced. The requirement for strict construction of a waiver does not mandate a ruling in the government's favor, and does not replace other canons of statutory interpretation. See Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589 (2008) ("The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction. Indeed, the cases on which the Government relies all used other tools of construction in tandem with the sovereign immunity canon.").

Power, the court held that corporations that became affiliated after the subsidiary paid the tax could only net interest if the payments were made by or attributable to a taxpayer with the same TIN when the tax interest subject to netting was paid. Thus, if a corporation with a different TIN later affiliates with another corporation, the overpayment by one affiliate cannot be netted with the underpayment of the parent corporation. The government argues that these cases establish a strict rule that where the acquired corporation and the acquiring/surviving corporation have different TINs when the overpayment or underpayment arose, § 6621(d) does not permit interest netting between them.

Plaintiff argues that the government's reliance on Energy East and Magma Power is misplaced because those cases dealt with affiliated corporations filing consolidated returns and not with the change in legal status of the acquired and acquiring corporations following a statutory merger. According to plaintiff, the legal status of a surviving corporation is significantly different from that of the relationship between a parent and subsidiary within a consolidated group. In the case of a merger, plaintiff explains, the acquired and acquiring corporations become one and the same as the surviving corporation and thus share a common history. In the case of parent and subsidiaries or other affiliated corporations that are part of a consolidated group, by contrast, each corporation retains its separate legal identity. Energy East and Magma Power are different from the present case, plaintiff argues, because the corporation seeking to net interest in this case, unlike the corporations in those cases, has now assumed the identity of the acquired entity by operation of law.

The court finds that a review of the facts in Energy East and Magma Power supports the plaintiff's contention that those cases involve factual scenarios that are very different from the ones presented in this case. In Energy East, the plaintiff acquired two other corporations, including their subsidiaries. 645 F.3d at 1359. As the new parent to these subsidiaries, the plaintiff sought to net interest between itself and the new subsidiaries in its consolidated income tax return under I.R.C. § 1501. Id. The court noted that "[t]he parties do not dispute that [the taxpayers] were not the 'same taxpayer,' under any definition, when their respective underpayments and overpayments were made." Id. at 1361. In rejecting the taxpayer's argument that the consolidated group was now the "same taxpayer" for purposes of § 6621(d), the court then found that "[u]nder the proper interpretation of the statute, [the plaintiff] cannot net the interest from its subsidiaries' overpayments because it was not the same taxpayer as its subsidiaries at the time the payments were made." Id. at 1363.

Magma Power also involved an effort at interest netting between parent and subsidiary corporations. The subsidiary was acquired by a consolidated group, after which it was included in the consolidated income tax return of the parent corporation, although it paid some other taxes separately. 101 Fed. Cl. at 565. The group sought to net interest on the subsidiary's pre-acquisition underpayment against post-acquisition overpayments by the parent. Id. The parties did not dispute that the subsidiary was responsible for the overpayment, but disputed whether or not the group was permitted to net the subsidiary's pre-acquisition underpayments against post-acquisition overpayments by the group as a whole. The plaintiffs argued that the interest could be netted, as "a

substantial portion of the overpayments were generated by an IRS audit and subsequent tax adjustment and were directly attributable to [the subsidiary]." Id. The Magma Power court, after finding that the Code does not define "same taxpayer," concluded that the TIN is the best point of reference for the "same taxpayer" determination, as it remained constant despite changes in corporate structure. Id. at 569-71. Rejecting the government's argument that a taxpayer could not net interest between payments made individually and payments made as part of a consolidated group, the court found that payments that could be traced to a particular TIN could be netted by the taxpayer with that TIN. Id. at 569-70.

Because Energy East and Magma Power involved separate but affiliated corporations, the court concludes that neither case is controlling here. Importantly, neither case examined the application of § 6621(d) in the context of a statutory merger, and the differences between merged corporations and consolidated corporations are critical to determining whether the proposed interest netting is by the "same taxpayer." In a merger, the acquired and acquiring corporations have no post-merger existence beyond the surviving corporation; instead, they become one and the same by operation of law, and thereafter the surviving corporation is liable for the pre-merger tax payments of both the acquired and acquiring corporations. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550 n.3 (1964) ("But cf. the general rule that in the case of a merger the corporation which survives is liable for the debts and contracts of the one which disappears." (citing 15 Fletcher, Private Corporations (1961 rev. ed.), § 7121)); Treas. Reg. § 1.368-2(b)(1)(ii). Because the surviving corporation steps into the shoes of the

acquired entity and the surviving corporation is liable retroactively for the tax payments of its predecessors, it does not matter when the initial payments were made. Put another way, following a merger, the law treats the acquired corporation as though it had always been part of the surviving entity.

The fact that the taxpayers in Energy East and Magma Power filed consolidated returns does not alter the court's analysis. In a consolidated group, assets and liabilities do not pass by operation of law, and an acquired corporation retains its individual identity. Those corporations do not become the same by operation of law. Indeed, members of a consolidated group may file a single consolidated income tax return, but are not required to do so. See I.R.C. § 1501. Thus, in this case, unlike Energy East and Magma Power, the corporations in the present case became the "same taxpayer" by virtue of the statutory merger.

It is for this reason, as well, that the TIN at the time that a tax is paid is not determinative of a taxpayer's legal status following a merger. An acquired corporation loses its TIN as part of a statutory merger because the surviving corporation becomes liable for any taxes owed by the acquired corporation. In this connection, the surviving corporation is also entitled to any refund due from tax overpayments made by the acquired corporation if the government has not yet paid the refund. In Magma Power, the court noted that the TIN served as a useful analog for sameness because it remained constant despite frequent changes in corporate structure. Id. at 570-71. However, where, as in this case, the acquired corporation discards its TIN following a merger and ceases to exist while the business of the corporation continues, it is clear that the TIN does not

account for this type of change in corporate structure, which was not foreseeable based on the facts in Magma Power. Accordingly, the court finds that where a statutory merger has occurred, the surviving corporation is the "same taxpayer" as the acquired corporation for purposes of § 6621(d).

In this connection, the court notes that this holding is in accordance with the well-established principle that statutory mergers result in a complete merging of the identities of the two predecessor corporations under other federal statutes. Most particularly, the Anti-Assignment Act, 31 U.S.C. § 3727, makes the same distinction between the surviving corporation in a statutory merger and members of a consolidated group. The Anti-Assignment Act prevents a party with a claim against the United States from transferring or assigning that claim to another party unless "a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C. § 3727(b). However, where a claim passes by operation of law, no such prohibition applies. See Seaboard Air Line Ry. v. United States, 256 U.S. 655, 656-57 (1921). In Seaboard, the Supreme Court explicitly recognized mergers as a scenario in which claims transfer by operation of law, stating that "[w]e cannot believe that Congress intended to discourage, hinder or obstruct the orderly merger or consolidation of corporations as the various States might authorize." Id. at 657.[10] In contrast, as the

[10] The use of the term "consolidation" is distinct from a consolidated group, and refers instead to a change in corporate structure in which both predecessor corporations cease to exist and an entirely new surviving corporation is formed. Black's Law Dictionary (9th ed. 2009), consolidation.

members of a consolidated group retain their separate identities and do not transfer their assets and liabilities by operation of law, no analogous rule automatically applies.

Finally, as discussed below, this holding is consistent with the positions that the IRS has taken in connection with the legal status of corporations following a statutory merger.

c. The IRS has consistently applied its rules to find that the parties to a statutory merger are the same following the merger.

I.R.C. § 368(a)(1)(A) provides that a statutory merger under state law is a form of reorganization recognized by the Code. The result of such a statutory merger is then defined by the Treasury regulations as follows:

> For purposes of section 368(a)(1)(A), a statutory merger or consolidation is a transaction effected pursuant to the statute or statutes necessary to effect the merger or consolidation, in which transaction, as a result of the operation of such statute or statutes, the following events occur simultaneously at the effective time of the transaction--
>
> (A) All of the assets (other than those distributed in the transaction) and liabilities (except to the extent such liabilities are satisfied or discharged in the transaction or are nonrecourse liabilities to which assets distributed in the transaction are subject) of each member of one or more combining units (each a transferor unit) become the assets and liabilities of one or more members of one other combining unit (the transferee unit); and
>
> (B) The combining entity of each transferor unit ceases its separate legal existence for all purposes; provided, however, that this requirement will be satisfied even if, under applicable law, after the effective time of the transaction, the combining entity of the transferor unit (or its officers, directors, or agents) may act or be acted against, or a member of the transferee unit (or its officers, directors, or agents) may act or be acted against in the name of the combining entity of the transferor unit, provided that such actions relate to assets or obligations of the combining entity of the transferor unit that arose, or relate to activities engaged in by such entity, prior to the effective time of the transaction,

> and such actions are not inconsistent with the requirements of paragraph (b)(1)(ii)(A) of this section.

Treas. Reg. § 1.368-2(b)(1)(ii). Thus, under these rules, the assets and liabilities of a pre-merger corporation become the assets and liabilities of a post-merger surviving corporation and the pre-merger corporations cease their separate legal existence.

The government argues that regardless of whether the acquiring corporation becomes liable for the acquired corporation's tax obligations, including interest owed on any tax, interest netting is not a tax itself but rather is a "tax attribute" and as a result does not necessarily transfer in a statutory merger. The government further argues that Congress has declined to include interest netting in I.R.C. § 381(a), which includes a list of tax attributes that transfer in a statutory merger. While the government concedes that the list is not exclusive, it nonetheless argues that Congress amended § 381 after the enactment of § 6621(d) and therefore has had ample opportunity to list interest netting as an attribute, thereby demonstrating an intent to exclude it from the attributes that transfer following a merger.

Plaintiff argues that the government's reliance on § 381 is not relevant. Plaintiff argues that interest netting is not a tax attribute but rather is an element of the tax itself. Specifically, plaintiff argues that interest is part of the tax and interest netting is a calculation of tax overpaid or underpaid and not a separate tax attribute. In support, plaintiff refers to I.R.C. § 6601(e)(1), which provides that interest "shall be assessed, collected, and paid in the same manner as taxes." Plaintiff argues that, if interest is treated as a tax, then netting, which is simply a calculation based on interest generated, is

also part of a tax. In response, the government argues that § 6601 is not controlling because it is a collection provision and not a general statement regarding the status of interest under the Code. Plaintiff disagrees, arguing that § 6601 provides definitions and a general overview of how interest functions within the Code, as evidenced by the provision's title: "Interest on underpayment, nonpayment, or extensions of time for payment, of tax." I.R.C. § 6601.

The court agrees with plaintiff and finds that § 6601 is a general statement regarding interest and is not limited to collections, as indicated by § 6601(a)'s "General rule," which expressly refers to the Code, stating:

> If <u>any amount of tax imposed by this title</u> (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the underpayment rate established under section 6621 shall be paid for the period from such last date to the date paid.

I.R.C. § 6601(a) (emphasis added). Thus, the court agrees with plaintiff that tax interest, including netting, is not a tax attribute limited by § 381(a).[11]

---

[11] Even if the court agreed that interest netting is a tax attribute, the fact that interest netting is not included on the § 381 list is not determinative because the legislative history on that provision makes clear that the list was not intended to be exhaustive. Specifically, the Conference Report states,

> [t]he section is not intended to affect the carryover treatment of an item or tax attribute not specified in the section or the carryover treatment of items or tax attributes in corporate transactions not described in subsection (a). No inference is to be drawn from the enactment of this section whether any item or tax attribute may be utilized by a successor or a predecessor corporation under existing law.

S. Rep. No. 83-1622, at 4915 (1954) (Conf. Rep.). Thus, the government's reliance on § 381 is misplaced.

The court also finds that that the government's position regarding whether the parties to a statutory merger become the "same taxpayer" for tax purposes is not consistent with the few rulings by the IRS on the question of the tax liability of a surviving corporation for the tax of an acquired corporation following a merger. As discussed below, whenever the IRS has determined sameness in situations involving statutory mergers—as opposed to those involving consolidated groups—the IRS has found that the acquired corporation is the same taxpayer as the surviving corporation. Thus, when the IRS considered employment taxes under the Federal Unemployment Tax Act ("FUTA"), it concluded that "where a corporation is absorbed by another corporation in a statutory merger or consolidation the resultant corporation should be regarded as the same taxpayer and the same employer for [FUTA] purposes." Rev. Rul. 62-60, 1962-1 C.B. 186, 1962 WL 13492 at 1 (1962). A similar result was reached in a ruling involving excise taxes under § 5705(a). In Rev. Rul. 66-125, the IRS held that following a merger the surviving corporation was entitled to a refund when it removed relevant products from the market. 1966-1 C.B. 342, 1966 WL 15263 at 1 (1966). The IRS stated that the surviving corporation "should be considered the 'manufacturer' within the intent of [the provision] since that corporation is the successor to the manufacturing corporation and, therefore, is entitled to file claim for credit or refund . . . ." Id. In a third ruling, the IRS determined that an acquired corporation's income should be included along with the surviving corporation's income in applying a now-repealed provision. Rev. Rul. 72-356, 1972-2 C.B. 452, 1972 WL 29559 at 1 (1972). Finally, in Rev. Rul. 80-144, the IRS determined that the unused foreign tax credits of an acquired corporation could transfer

Case: 15-5069 Document: 17 Page: 134 Filed: 05/13/2015

over to the surviving corporation. 1980-23 I.R.B. 7, 1980-1 C.B. 80, 1980 WL 129701 at 1 (1980).

While none of these IRS rulings deal with interest netting, they demonstrate that the IRS has consistently treated the surviving corporation as the same taxpayer as the acquired corporation following a merger. Under this view, interest netting by merged corporations would be consistent with IRS revenue rulings to date. Indeed, as noted above, the IRS has previously allowed Wells Fargo to use interest netting in situations that are very similar to the ones at issue here. In 2010, the IRS permitted interest netting under § 6621(d) for three situations involving plaintiff that are nearly identical to the three scenarios here. See supra note 6. While the government contends that this determination was made prior to Energy East, and is therefore legally questionable, the court has determined that Energy East is not determinative of this case and therefore has no reason to believe that the IRS has changed its practice in the interim.

In fact, a review of several IRS internal memoranda prepared by individual IRS attorneys, referred to as Chief Counsel Advice ("CCA") and Field Service Advice ("FSA"), demonstrates that interest netting involving merged corporations was authorized. While this guidance is not precedential, even within the agency,[12] as in other cases, the court here finds that the guidance in these memoranda is helpful in determining the position of the IRS. See Rowan Cos. v. United States, 452 U.S. 247, 262 n.17 (1981)

[12] As a result, it appears that some memoranda may conflict with others, apparently without revoking the earlier guidance. As the court is merely treating these memoranda as informative of the IRS's approach to determining "same taxpayer" status, this does not affect the court's conclusion.

(“Although these rulings have no precedential force, . . . they are evidence . . . .” (citations omitted)); Magma Power, 101 Fed. Cl. at 571-72.

In one FSA,[13] the IRS discussed whether the surviving corporation in a statutory merger could net interest between the overpayment of the acquired corporation and the underpayment of the acquiring corporation. The FSA concluded that, as a result of the merger, “[the acquiring corporation] assumed [the acquired corporation]’s liabilities,” and therefore is entitled to net the overpayment against its own underpayment. I.R.S. Field Serv. Advice Mem. 200212028 (Mar. 22, 2002), 2002 WL 442928.[14] The FSA noted that “[i]t is important that [the acquiring corporation] assume [the acquired corporation]’s liabilities” and that the former would not be entitled to net interest if the latter continued to exist. Id. Of the two memoranda in which the corporations were not found to be the “same taxpayer,” both involved subsidiaries and parent corporations, which, as the court found above with respect to Energy East and Magma Power, are factually distinct from the present case. I.R.S. Chief Counsel Advice 201225011 (June 22, 2012), 2012 WL 2361303; I.R.S. Chief Counsel Advice 201222001 (June 1, 2012), 2012 WL 1961411.[15] As a result, the court finds that IRS guidance is consistent with the

---

[13] The memorandum refers to itself as a CCA, but is titled as an FSA.

[14] The FSA also discussed whether § 6621(d) applies in eight other scenarios that are that are not relevant to this case, finding that it applied in one other scenario, did not apply in five, and was unresolved in the remaining two.

[15] As these memoranda were issued following Energy East, the government also argued that they demonstrated a reversal in the policy of the I.R.S. in applying § 6621(d). However, because the court has concluded that the corporate structures are legally and factually distinct, no such conclusion may be drawn.

Case: 1:15-cv-00908 Document 72 Page 136 Filed 06/27/14 Page 136 of 28

plaintiff's view that mergers are distinct from other consolidated corporate relationships and that in the case of mergers, interest netting is allowed because the merged corporations are considered to be the same taxpayers for purposes of § 6621(d).

Finally, the court finds that IRS guidance under an analogous provision of the Code is also consistent with the court's conclusion that an acquired corporation is the "same taxpayer" as the surviving corporation following a statutory merger. Specifically, plaintiff notes that I.R.C. § 6402, which allows for offsetting tax underpayments with tax overpayments by a taxpayer, has consistently treated merged corporations as the "same taxpayer" for purposes of that section. Section 6402 provides:

> In the case of any overpayment, the [IRS], within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), (e), and (f) refund any balance to such person.

I.R.C. § 6402(a). The government argues that this provision is narrower than § 6621(d) in that it applies only to tax years that remain open and is purely discretionary on the part of the IRS.[16] However, in FSAs addressing the issue, the IRS has consistently allowed offsetting by the surviving corporation with overpayments made by an acquired entity. In addition, the IRS has recognized the similarities between § 6402 and § 6621(d). In one FSA, the IRS addressed a scenario in which a consolidated group with prior

[16] Additionally, the government argues that § 6402 does not by its terms expressly limit offsetting to payments by the "same taxpayer," making the IRS's determinations about it irrelevant for purposes of deciding this issue. While the provision is not expressly limited as § 6621(d) is, the court notes that they serve the same remedial purpose of making taxpayers whole and, as discussed above, are analogized to each other. For this reason, the court finds that IRS policies regarding the provision provide additional support for the court's conclusion.

overpayments was acquired by another consolidated group with outstanding tax liabilities, resulting in the parent and some subsidiaries in the acquired group being liquidated or otherwise ceasing to exist. I.R.S. Field Serv. Advice Mem. 200027026 (July 7, 2000), 2000 WL 33006060. Noting that Congress intended for § 6402 to be broadly construed, the FSA states that the acquired group's overpayment could be credited against the surviving group's liabilities. Id. In this connection, the FSA briefly discusses § 6621(d), stating that the hypothetical at issue lacked the specific facts to address whether consolidated groups that share some, but not all, members are the "same taxpayer" for purposes of that provision. The FSA then goes on to note that "the legislative history of section 6621(d) indicates that the zero interest rate applies in those circumstances where the Service would normally offset if the underpayments and overpayments were currently outstanding." Id. (citing H.R. Rep. No. 105-599, at 257 (1998) (Conf. Rep.)).

d. Wells Fargo is Entitled to Net Interest in Each of The Test Claims.

The court thus concludes that merged corporations are the "same taxpayer" for purposes of § 6621(d) based on the undisputed principles of corporate law, as well as IRS rules governing statutory mergers and IRS guidance. Thus, for each of the three scenarios presented in this case, interest netting will be allowed.

i. Scenario One

Under this fact pattern, plaintiff proposes to net underpayment interest on First Union's 1999 income tax account against overpayment interest on Old Wachovia's 1993 income tax account. Specifically, plaintiff seeks to net interest for the periods from

March 15, 2000 to December 26, 2001 and from January 25, 2002 to March 15, 2004. Thus, plaintiff seeks to net interest between the pre-merger acquired corporation and the pre-merger acquiring corporation. Contrary to the government's contention, the court finds that this scenario is not controlled by <u>Energy East</u> because this scenario involves interest netting in connection with merged corporations rather than consolidated groups. Old Wachovia merged with First Union in 2001, and became one and the same with First Union (now Wells Fargo) on the date of that merger, after which the surviving corporation shared the past of both the acquired and acquiring corporations. Accordingly, based on the authorities discussed above, the court finds that Old Wachovia and First Union became the "same taxpayer" by operation of law and thus interest netting is allowed.

ii. Scenario Two

Under this fact pattern, plaintiff seeks to net underpayment interest on First Union's 1999 income tax account against overpayment interest on First Union's 1993 income tax account, representing a pre-merger acquiring corporation and the post-merger surviving corporation. Specifically, plaintiff seeks to net interest on the periods from January 25, 2002 to March 15, 2002. For the same reasons as the court has discussed above, the fact that the underpayment may have arisen from income generated by corporations that merged into First Union after 1993 is irrelevant. Following the merger, those corporations became one with First Union. The court therefore finds that interest netting is allowed in this scenario.

iii. Scenario Three

Under this fact pattern, plaintiff seeks to net underpayment interest on First Union's 1999 income tax account against overpayment interest on CoreStates's 1992 income tax account, representing a pre-merger acquired corporation and a post-merger surviving corporation. Specifically, plaintiff seeks to net interest on the period from March 15, 2000 to March 15, 2002. Based on the same reasoning discussed above, the court finds that the entities became the "same taxpayer" by operation of law through the statutory merger and thus the court finds that interest netting is allowed.

IV. CONCLUSION

For the reasons set forth above, plaintiff's motion for partial summary judgment is **GRANTED** and the government's cross-motion for partial summary judgment is **DENIED**. The parties shall file a joint status report detailing next steps for this litigation by **July 16, 2014**.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge

In the United States Court of Federal Claims

No. 11-808T
(Filed: October 20, 2014)

WELLS FARGO & COMPANY,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

O R D E R

Pending before the court is the government's motion for leave to appeal the court's June 27, 2014 opinion, ECF No. 84. In the motion, the government asks that the court amend the opinion to include language certifying the issue for appeal. Plaintiff initially opposed the motion, arguing that the remaining issue of whether interest netting in a consolidated group setting requires "tracing" between the various members of the group or groups should be resolved before any appeal was made. The government then indicated in its reply that it had conferred with the IRS and determined that it had not identified any claim in this case for which that tracing issue would affect the netting computation, and as a result stated that it would not pursue the tracing argument in this case. As a result, plaintiff moved to withdraw its opposition and join the motion for leave. [1]

The court agrees with the parties that there is a substantial ground for difference of opinion regarding the court's opinion and that an immediate appeal may materially advance the ultimate termination of this litigation. 28 U.S.C. § 1292(d)(2). Accordingly, the motion is hereby **GRANTED**.[2] The court will issue an amended opinion including the following language:

---

[1] Plaintiff's motion to withdraw its opposition, ECF No. 89, is **GRANTED**.

[2] As oral argument on the motion is no longer necessary, the hearing scheduled for October 29, 2014 is hereby **CANCELED**.

Pursuant to 28 U.S.C. § 1292(d)(2), the court certifies that the interpretation of § 6621(d) presents a controlling question of law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from this order with regard to that question may materially advance the ultimate termination of this litigation. All proceedings in this matter are stayed until further order of the court.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge

In the United States Court of Federal Claims

No. 11-808T
(Filed: October 20, 2014)

WELLS FARGO & COMPANY, Plaintiff, v. THE UNITED STATES, Defendant.	)	Tax; Interest Netting under 26 U.S.C. § 6621(d); "Same Taxpayer"; Merged Corporations

Gerald A. Kafka, Washington, DC, with whom were *Rita A. Cavanagh* and *Chad D. Nardiello*, of counsel, and *Andrew T. Gardner*, Minneapolis, MN, tax counsel, for plaintiff.

Jason Bergmann, Tax Division, United States Department of Justice, Washington, DC, with whom were *Kathryn Keneally*, Assistant Attorney General, and *David I. Pincus*, Chief, Court of Federal Claims Section, for defendant.

AMENDED OPINION

FIRESTONE, *Judge*.

This case presents an issue of first impression regarding the application of Internal Revenue Code ("I.R.C." or "Code") § 6621(d) to corporations that have acquired other corporations or been acquired through a statutory merger. It concerns whether plaintiff, Wells Fargo & Company ("Wells Fargo"), is entitled to net the interest paid on certain tax underpayments owed by Wells Fargo or its predecessor, First Union Corporation ("First Union"), with the interest owed by the United States to Wells Fargo on

overpayments made by First Union or other companies acquired by Wells Fargo through various corporate mergers. The case turns on the definition of the term "same taxpayer" in § 6621(d).[1] Section 6621(d) was enacted in 1998 to allow for "global netting" on interest rates for tax overpayments and tax underpayments by the "same taxpayer" in order to address the disparity between the higher interest rate imposed on tax underpayments and the lower interest rate applied when the government pays a refund on tax overpayments.[2] The statute provides that the interest rates may be netted to zero when there are overlapping overpayments and underpayments by the "same taxpayer"

---

[1] The provision states:

> Elimination of interest on overlapping periods of tax overpayments and underpayments.--To the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer of tax imposed by this title, the net rate of interest under this section on such amounts shall be zero for such period.

I.R.C. § 6621(d).

[2] The purpose of § 6621(d) is addressed in detail in Magma Power Co. v. United States, 101 Fed. Cl. 562 (2011). In brief, interest is payable on tax deficiencies under I.R.C. § 6601 and is allowed on overpayments under I.R.C. § 6611. Under the Code, taxpayers pay interest at a higher rate on tax underpayments than the interest they receive from the IRS on tax overpayments. Because of this differential, a taxpayer that underpaid some taxes and overpaid others could end up owing interest even where the taxes themselves netted to zero. Prior to § 6621(d)'s enactment, this imbalance could only be corrected through discretionary offsetting under I.R.C. § 6402, in the limited circumstances where the underlying tax obligations were still unresolved and the interest can be calculated before any final tax payment is made. Section 6621(d) permits taxpayers to correct the interest differential by allowing for a refund of the extra interest payment even if one or both of the tax and interest payments have been made and the overlapping period of tax overpayment and tax underpayment is thus not identified until after the tax payment.

during the same period.[3] Plaintiff argues that the term “same taxpayer” includes both predecessors of the surviving corporation in a statutory merger and that, as a result, the statute allows for interest netting regardless of whether the overlapping overpayments and underpayments involve corporations that were separate until the merger is carried out. According to plaintiff, following a merger, the entities become one and the same as a matter of law and thus become the “same” for purposes of interest netting. The government argues that the phrase “same taxpayer” is narrower than plaintiff argues. The government contends that taxpayers should only be considered the “same” for purposes § 6621(d) if they had the same Taxpayer Identification Number (“TIN”) at the time of the initial tax overpayment or underpayment, regardless of whether the entities later merged and the surviving entity is now a single entity for tax purposes.

Now pending before the court are the parties’ cross motions for partial summary judgment under Rule 56 of the Rules of the United States Court of Federal Claims (“RCFC”) with regard to the proper interpretation of “same taxpayer” in the context of three separate test claims arising from specific Wells Fargo mergers, representing the three varieties of transaction that occur in this case.[4] Oral argument was held on June 6, 2014. For the reasons set forth below, the court **GRANTS** plaintiff’s motion for partial summary judgment and **DENIES** the government’s cross-motion for partial summary judgment.

---

[3] There is no dispute between the parties that for purposes of this motion, the plaintiff has satisfied the requirement that the tax and interest payments cover overlapping periods. The issue on this motion is whether the tax and interest payments involve the “same taxpayer.”

[4] The facts of these test claims are discussed infra.

I. BACKGROUND

The relevant facts are undisputed. The claims in this case arise from seven mergers which culminated in the formation of Wells Fargo as it currently exists. Consol. Stmt. of Uncont. Facts ¶ 4. These mergers can be divided into two lines: the Wells Fargo line and the Wachovia line.

a. Wells Fargo Line of Mergers

In 1998, Norwest Corporation (“Norwest”) acquired Wells Fargo & Company (“Old Wells Fargo”) through a forward triangular merger under I.R.C. §§ 368(a)(1)(A), 368(a)(2)(D).[5] Id. at ¶¶ 8, 10. The board of directors approved a merger agreement on June 7, 1998, which was subsequently approved by the shareholders. Id. at ¶¶ 8-9. Old Wells Fargo merged into WFC Holdings, Corp. (“WFC”), a subsidiary of Norwest organized for purposes of the merger. Id. at ¶ 10. As a result, Norwest and WFC survived the merger, while Old Wells Fargo’s separate existence was terminated; Norwest changed its name to Wells Fargo & Company. Id. at ¶¶ 11-12, 15. WFC

---

[5] Section 368(a)(1)(A) defines “a statutory merger or consolidation” as a type of reorganization. I.R.C. § 368(a)(1)(A). Section 368(a)(2)(D) sets forth the procedure for a reorganization using a corporation’s stock:

> The acquisition by one corporation, in exchange for stock of a corporation (referred to in this subparagraph as “controlling corporation”) which is in control of the acquiring corporation, of substantially all of the properties of another corporation shall not disqualify a transaction under paragraph (1)(A) . . . if--
>
> (i) no stock of the acquiring corporation is used in the transaction, and
>
> (ii) in the case of a transaction under paragraph (1)(A), such transaction would have qualified under paragraph (1)(A) had the merger been into the controlling corporation.

I.R.C. § 368(a)(2)(D).

acquired the assets and assumed the liabilities of Old Wells Fargo, and became the common parent of the affiliated corporations that were previously members of Old Wells Fargo's consolidated group. Id. at ¶¶ 13-14.

In 2008, Wells Fargo and Wachovia Corporation ("New Wachovia") carried out a merger under I.R.C. § 368(a)(1)(A). Id. at ¶¶ 16, 18, 20. The board of directors approved a merger agreement on October 3, 2008, which was subsequently approved by the shareholders. Id. at ¶¶ 18-19. Wells Fargo survived the merger, while New Wachovia's separate existence was terminated. Id. at ¶¶ 21-22. Wells Fargo acquired the assets and assumed the liabilities of New Wachovia, and became the common parent of the affiliated corporations that were previously members of New Wachovia's consolidated group. Id. at ¶¶ 23-24.

b. Wachovia Line of Mergers

In 1996, First Union acquired First Fidelity Bancorporation ("Fidelity") through a forward triangular merger under I.R.C. §§ 368(a)(1)(A), 368(a)(2)(D). Id. at ¶¶ 25, 29. The board of directors approved a merger agreement on December 22, 1995, which was subsequently approved by the shareholders. Id. at ¶¶ 27-28. Fidelity merged into First Union Corporation of New Jersey ("FCNJ"), a subsidiary of First Union organized for purposes of the merger. Id. at ¶ 29. As a result, First Union and FCNJ survived the merger, while Fidelity's separate existence was terminated. Id. at ¶¶ 30-31. FCNJ acquired the assets and assumed the liabilities of Fidelity, and became the common parent of the affiliated corporations that were previously members of Fidelity's consolidated group. Id. at ¶¶ 32-33.

In 1998, FCNJ and First Union carried out a merger under I.R.C. § 368(a)(1)(A). Id. at ¶¶ 34, 37. First Union held 100% of the stock of FCNJ. Id. at 35. The board of directors approved a merger plan on February 11, 1998. Id. at ¶ 36. First Union survived the merger, while FCNJ's separate existence was terminated. Id. at ¶¶ 38-39. First Union acquired the assets and assumed the liabilities of FCNJ. Id. at ¶¶ 40-41.

In 1997, First Union and Signet Banking Corporation ("Signet") carried out a merger under I.R.C. § 368(a)(1)(A). Id. at ¶¶ 42, 46. The board of directors approved a merger agreement on July 18, 1997, which was subsequently approved by the shareholders. Id. at ¶¶ 44-45. First Union survived the merger, while Signet's separate existence was terminated. Id. at ¶¶ 47-48. First Union acquired the assets and assumed the liabilities of Signet, and became the common parent of the affiliated corporations that were previously members of Signet's consolidated group. Id. at ¶¶ 49-50.

In 1998, First Union and CoreStates Financial Corporation ("CoreStates") carried out a merger under I.R.C. § 368(a)(1)(A). Id. at ¶¶ 51, 55. The board of directors approved a merger agreement on November 18, 1997, which was subsequently approved by the shareholders. Id. at ¶¶ 53-54. First Union survived the merger, while CoreStates's separate existence was terminated. Id. at ¶¶ 56-57. First Union acquired the assets and assumed the liabilities of CoreStates, and became the common parent of the affiliated corporations that were previously members of CoreStates's consolidated group. Id. at ¶¶ 58-59.

In 2001, First Union and Wachovia Corporation ("Old Wachovia") carried out a merger under I.R.C. § 368(a)(1)(A). Id. at ¶¶ 60, 64. The board of directors approved a

merger agreement on April 15, 2001, which was subsequently approved by the shareholders. Id. at ¶¶ 62-63. First Union survived the merger, while Old Wachovia's separate existence was terminated. Id. at ¶¶ 65-66. First Union acquired the assets and assumed the liabilities of Old Wachovia, and became the common parent of the affiliated corporations that were previously members of Old Wachovia's consolidated group. Id. at ¶¶ 67-68. First Union changed its name to Wachovia Corporation. Id. at ¶ 69. As noted above, Wachovia and Wells Fargo merged in 2008.

c. Procedural History

Beginning in 2009, Wells Fargo filed three administrative claims with the IRS seeking, among other things, refunds based on interest netting between interest paid on tax underpayments and interest paid on tax overpayments, relying on § 6621(d). Id. at 70. Specifically, on December 15, 2010, Wells Fargo filed an interest claim related to New Wachovia and Old Wachovia. Id. at 75. On June 9, 2011, Wells Fargo filed an interest claim related to Wells Fargo. Id. at 76. On November 17, 2011, Wells Fargo filed an interest claim related to Wells Fargo, Signet, New Wachovia, and Old Wachovia. Id. at 77. These claims were not accepted. The IRS did, however, allow for interest netting on certain other claims.[6]

---

[6] In addition to the claims at issue in this case, plaintiff has filed other claims with the IRS seeking to net interest pursuant to § 6621(d). Def.'s Notice of Add'l Facts, Ex. 1 (Decl. of Andrew T. Gardner), ¶ 6, ECF No. 66. In 2008, plaintiff filed administrative claims seeking refunds based on situations similar to those at issue in this case, as discussed below: (1) netting between a 1997 tax underpayment by Old Wachovia and a 1987 overpayment by First Union; (2) netting between a 1997 tax underpayment by First Union and a 1987 overpayment by First Union; and (3) netting between a 1997 underpayment by First Union and a 1995 overpayment by First Fidelity. Id. at ¶¶ 7-9. The IRS allowed interest netting between these payments on June 10, 2010. Id. The government contends that the IRS legally erred in allowing interest netting for

On December 1, 2011, plaintiff timely filed a complaint in this court. After the government moved to dismiss some of plaintiff's claims under 28 U.S.C. § 1500 based on claims pending in district court,[7] plaintiff stipulated to their dismissal. See Order Dismissing Claims, Oct. 23, 2012, ECF No. 34. On October 22, 2012, plaintiff filed an amended complaint containing 64 separate claims for a refund on overpayments based on the application of the interest netting authorized under § 6621(d). Thereafter, the parties identified three test claims, based on scenarios representing three different merger transactions, to test the application of § 6621(d):

Scenario One: This scenario is intended to address whether interest netting is allowed in connection with underpayments and overpayments between a pre-merger acquiring corporation and a pre-merger acquired corporation. It involves underpayment interest on First Union's 1999 income tax account against overpayment interest on Old Wachovia's 1993 income tax account.

Scenario Two: This scenario is intended to address whether interest netting is allowed in connection with underpayments and overpayments between a pre-merger acquiring corporation and the post-merger surviving corporation. It involves underpayment interest on First Union's 1999 income tax account against overpayment interest on First Union's 1993 income tax account.

---

those claims on the grounds that they preceded a federal circuit decision which the government contends dictates a different outcome. See infra page 19.

[7] That prior litigation is still pending in the United States District Court for the District of Minnesota.

Scenario Three: This scenario is intended to address whether interest netting is allowed between the pre-merger acquired corporation and the post-merger surviving corporation. It involves underpayment interest on First Union's 1999 income tax account against overpayment interest on CoreStates's 1992 income tax account.

II. STANDARD OF REVIEW

Under RCFC 56, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). This case is especially appropriate for summary judgment because the material facts are not in dispute and the parties have presented a purely legal question for the court to resolve. RCFC 56(a).

III. DISCUSSION

As discussed above, because interest netting is allowed by the "same taxpayer," the dispute in this case centers on the meaning of "same taxpayer" under § 6621(d) in the context of a statutory merger. Under the government's definition of the phrase, a taxpayer is only the "same taxpayer" if and only if, at the time of the overlapping tax payments, both taxpayers share the same TIN. Because an acquired company never has the same TIN as the acquiring or surviving corporation, the government argues, interest on a tax underpayment or overpayment attributable to income from entities later acquired by Wells Fargo cannot be netted with interest on overpayments or underpayments attributable to Wells Fargo.

Plaintiff argues that § 6621(d) allows for interest netting among merged entities on the grounds that, following a merger, the acquiring corporation becomes one and the

same with the corporation it acquired by operation of law. In such circumstances, plaintiff argues, it shares the history of both the acquired and acquiring entity. According to Wells Fargo, the government's interpretation of "same taxpayer" is legally incorrect because it fails to take into account the legal realities of corporations following mergers, including the obligation of the surviving corporation to assume the tax liabilities of the acquired entity. Plaintiff further argues that, following a statutory merger, the acquired entity ceases to exist, along with its TIN, and thus at the time a taxpayer seeks interest netting following a merger, the TIN no longer serves as an adequate representation of taxpayers for purposes of determining "same taxpayer" status.[8] It is with this understanding of the parties' arguments that the court turns to its analysis.

a. The Statutory Language and Legislative History Do Not Provide a Plain Meaning for "Same Taxpayer"

As with any case involving a question of statutory interpretation or construction, we begin with the language of the statute itself. Duncan v. Walker, 533 U.S. 167, 172 (2001). Here, as noted above, § 6621(d), provides:

> To the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and

[8] As discussed later in this opinion, plaintiff acknowledges that, as a matter of law, a surviving corporation does not acquire certain tax attributes of an acquired corporation while other attributes are authorized under I.R.C. § 381. Interest netting is not explicitly identified in the Code as a tax attribute that survives acquisition of a corporation. The government argues that interest netting is a tax attribute of an acquired corporation and unless expressly permitted is not allowed. Plaintiff argues that interest netting is instead a calculation related to interest itself rather than a separate attribute, and further argues that interest is treated as a tax. Thus, according to plaintiff, interest netting is not a tax attribute of the acquired corporation. As discussed infra, tax attributes are typically tax benefits—such as deductions—authorized by the Code.

> overpayments by the same taxpayer of tax imposed by this title, the net rate of interest under this section on such amounts shall be zero for such period.

I.R.C. § 6621(d) (emphasis added). "Same taxpayer" is not defined in § 6621(d), nor is it defined elsewhere in the IRC. In addition, there are no Treasury regulations that define "same taxpayer." The government nonetheless argues that the plain language of the text requires the use of the TIN to determine whether parties are the "same taxpayer." Specifically, the government argues that its interpretation is compelled by the placement of the phrase "by the same taxpayer" immediately following "equivalent underpayments and overpayments" in § 6621(d). According to the government, the statute creates a temporal requirement which mandates that the taxpayer seeking to engage in interest netting be the same at the time that the payments were made, and that this requirement can only be satisfied by having the same TIN at the time the of the payments.

Plaintiff argues that any temporal requirement is met once a statutory merger is completed. Specifically, plaintiff argues that any temporal requirement is satisfied once the corporations become the same legal entity by operation of law by completing the statutory merger. Thus, plaintiff contends that where, as here, interest on overpayments and underpayments for the same period were identified and are either owed or refunded to the post-merger corporation, the corporation liable for underpayment interest is, in fact, the same corporation entitled to the overpayment interest.

The parties also disagree on the need to look to the legislative history in order to resolve this dispute. The government argues that resorting to the legislative history is not necessary because the statutory text's meaning is plain. Plaintiff argues that the

legislative history supports its view that the statute must be given a liberal construction as a remedial statute. As noted by the parties, the term "same taxpayer" is not defined in the statute and is not self-defining. Accordingly, the court finds that the meaning is not plain and turns to the legislative history for guidance.

A review of the legislative history reveals that Congress intended for § 6621(d) to be remedial in nature. As such, the statute must be construed broadly. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) ("In addition, we are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."). The legislative history does not offer any insight into the meaning of the phrase "same taxpayer," but does provide some indication of Congress's purpose in passing the legislation. First, the legislative history makes clear that Congress intended the provision to provide fairness for taxpayers. H.R. Rep. No. 105-364, pt. 1, at 63-64 (1997) ("taxpayers should be charged interest only on the amount they actually owe, taking into account overpayments and underpayments from all open years."); S. Rep. No. 105-174 at 61 (1998). Second, the legislative history also makes clear that Congress was aware that large corporations, like plaintiff, would be the primary beneficiaries of the provision, because only large corporations such as plaintiff would likely have multiple open years with the IRS.

Having considered the parties arguments, the court finds that the plain language of § 6621(d) does not answer the question presented because the phrase "same taxpayer" is not self-defining and the temporal relationship identified by the government does not aid in defining the term in the context of statutory mergers. Plaintiff correctly notes that

"same taxpayer" is a legal term that relies on an examination of the legal status of the taxpayer that is seeking to net interest. In addition, a review of the legislative history does not resolve the question presented.[9] Without a discussion of the meaning of "same taxpayer" in the legislative history, it is of limited help in defining the term. As a result, the court turns to the definitions proposed by the parties.

b. Corporations formed through statutory mergers, in contrast to members of affiliated groups, are the "same taxpayer" for purposes of § 6621(d).

The government argues that the legal right to net interest depends on the whether the overpayment and underpayment were made by the taxpayer with the same TIN at the time of the payments. This argument is derived in large part from two cases: Energy E. Corp. v. United States, 645 F.3d 1358 (Fed. Cir. 2011), and Magma Power Co. v. United States, 101 Fed. Cl. 562 (2011). In Energy East, the Federal Circuit held that a parent corporation and subsidiary that were not affiliated at the time they each made tax payments could not net interest under § 6621(d) in their consolidated return. The meaning of "same taxpayer" was not before the court and the court focused instead on the issue of when the initial tax payments were made. The holding was expanded by this court in Magma Power, where the definition of "same taxpayer" was at issue. In Magma

[9] The government argues that § 6621(d) must be strictly construed in its favor because it amounts to a waiver of sovereign immunity. The court finds the government's reference to sovereign immunity to be misplaced. The requirement for strict construction of a waiver does not mandate a ruling in the government's favor, and does not replace other canons of statutory interpretation. See Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589 (2008) ("The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction. Indeed, the cases on which the Government relies all used other tools of construction in tandem with the sovereign immunity canon.").

Power, the court held that corporations that became affiliated after the subsidiary paid the tax could only net interest if the payments were made by or attributable to a taxpayer with the same TIN when the tax interest subject to netting was paid. Thus, if a corporation with a different TIN later affiliates with another corporation, the overpayment by one affiliate cannot be netted with the underpayment of the parent corporation. The government argues that these cases establish a strict rule that where the acquired corporation and the acquiring/surviving corporation have different TINs when the overpayment or underpayment arose, § 6621(d) does not permit interest netting between them.

Plaintiff argues that the government's reliance on Energy East and Magma Power is misplaced because those cases dealt with affiliated corporations filing consolidated returns and not with the change in legal status of the acquired and acquiring corporations following a statutory merger. According to plaintiff, the legal status of a surviving corporation is significantly different from that of the relationship between a parent and subsidiary within a consolidated group. In the case of a merger, plaintiff explains, the acquired and acquiring corporations become one and the same as the surviving corporation and thus share a common history. In the case of parent and subsidiaries or other affiliated corporations that are part of a consolidated group, by contrast, each corporation retains its separate legal identity. Energy East and Magma Power are different from the present case, plaintiff argues, because the corporation seeking to net interest in this case, unlike the corporations in those cases, has now assumed the identity of the acquired entity by operation of law.

The court finds that a review of the facts in Energy East and Magma Power supports the plaintiff's contention that those cases involve factual scenarios that are very different from the ones presented in this case. In Energy East, the plaintiff acquired two other corporations, including their subsidiaries. 645 F.3d at 1359. As the new parent to these subsidiaries, the plaintiff sought to net interest between itself and the new subsidiaries in its consolidated income tax return under I.R.C. § 1501. Id. The court noted that "[t]he parties do not dispute that [the taxpayers] were not the 'same taxpayer,' under any definition, when their respective underpayments and overpayments were made." Id. at 1361. In rejecting the taxpayer's argument that the consolidated group was now the "same taxpayer" for purposes of § 6621(d), the court then found that "[u]nder the proper interpretation of the statute, [the plaintiff] cannot net the interest from its subsidiaries' overpayments because it was not the same taxpayer as its subsidiaries at the time the payments were made." Id. at 1363.

Magma Power also involved an effort at interest netting between parent and subsidiary corporations. The subsidiary was acquired by a consolidated group, after which it was included in the consolidated income tax return of the parent corporation, although it paid some other taxes separately. 101 Fed. Cl. at 565. The group sought to net interest on the subsidiary's pre-acquisition underpayment against post-acquisition overpayments by the parent. Id. The parties did not dispute that the subsidiary was responsible for the overpayment, but disputed whether or not the group was permitted to net the subsidiary's pre-acquisition underpayments against post-acquisition overpayments by the group as a whole. The plaintiffs argued that the interest could be netted, as "a

substantial portion of the overpayments were generated by an IRS audit and subsequent tax adjustment and were directly attributable to [the subsidiary]." Id. The Magma Power court, after finding that the Code does not define "same taxpayer," concluded that the TIN is the best point of reference for the "same taxpayer" determination, as it remained constant despite changes in corporate structure. Id. at 569-71. Rejecting the government's argument that a taxpayer could not net interest between payments made individually and payments made as part of a consolidated group, the court found that payments that could be traced to a particular TIN could be netted by the taxpayer with that TIN. Id. at 569-70.

Because Energy East and Magma Power involved separate but affiliated corporations, the court concludes that neither case is controlling here. Importantly, neither case examined the application of § 6621(d) in the context of a statutory merger, and the differences between merged corporations and consolidated corporations are critical to determining whether the proposed interest netting is by the "same taxpayer." In a merger, the acquired and acquiring corporations have no post-merger existence beyond the surviving corporation; instead, they become one and the same by operation of law, and thereafter the surviving corporation is liable for the pre-merger tax payments of both the acquired and acquiring corporations. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550 n.3 (1964) ("But cf. the general rule that in the case of a merger the corporation which survives is liable for the debts and contracts of the one which disappears." (citing 15 Fletcher, Private Corporations (1961 rev. ed.), § 7121)); Treas. Reg. § 1.368-2(b)(1)(ii). Because the surviving corporation steps into the shoes of the

acquired entity and the surviving corporation is liable retroactively for the tax payments of its predecessors, it does not matter when the initial payments were made. Put another way, following a merger, the law treats the acquired corporation as though it had always been part of the surviving entity.

The fact that the taxpayers in Energy East and Magma Power filed consolidated returns does not alter the court's analysis. In a consolidated group, assets and liabilities do not pass by operation of law, and an acquired corporation retains its individual identity. Those corporations do not become the same by operation of law. Indeed, members of a consolidated group may file a single consolidated income tax return, but are not required to do so. See I.R.C. § 1501. Thus, in this case, unlike Energy East and Magma Power, the corporations in the present case became the "same taxpayer" by virtue of the statutory merger.

It is for this reason, as well, that the TIN at the time that a tax is paid is not determinative of a taxpayer's legal status following a merger. An acquired corporation loses its TIN as part of a statutory merger because the surviving corporation becomes liable for any taxes owed by the acquired corporation. In this connection, the surviving corporation is also entitled to any refund due from tax overpayments made by the acquired corporation if the government has not yet paid the refund. In Magma Power, the court noted that the TIN served as a useful analog for sameness because it remained constant despite frequent changes in corporate structure. Id. at 570-71. However, where, as in this case, the acquired corporation discards its TIN following a merger and ceases to exist while the business of the corporation continues, it is clear that the TIN does not

account for this type of change in corporate structure, which was not foreseeable based on the facts in Magma Power. Accordingly, the court finds that where a statutory merger has occurred, the surviving corporation is the "same taxpayer" as the acquired corporation for purposes of § 6621(d).

In this connection, the court notes that this holding is in accordance with the well-established principle that statutory mergers result in a complete merging of the identities of the two predecessor corporations under other federal statutes. Most particularly, the Anti-Assignment Act, 31 U.S.C. § 3727, makes the same distinction between the surviving corporation in a statutory merger and members of a consolidated group. The Anti-Assignment Act prevents a party with a claim against the United States from transferring or assigning that claim to another party unless "a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C. § 3727(b). However, where a claim passes by operation of law, no such prohibition applies. See Seaboard Air Line Ry. v. United States, 256 U.S. 655, 656-57 (1921). In Seaboard, the Supreme Court explicitly recognized mergers as a scenario in which claims transfer by operation of law, stating that "[w]e cannot believe that Congress intended to discourage, hinder or obstruct the orderly merger or consolidation of corporations as the various States might authorize." Id. at 657.[10] In contrast, as the

[10] The use of the term "consolidation" is distinct from a consolidated group, and refers instead to a change in corporate structure in which both predecessor corporations cease to exist and an entirely new surviving corporation is formed. Black's Law Dictionary (9th ed. 2009), consolidation.

members of a consolidated group retain their separate identities and do not transfer their assets and liabilities by operation of law, no analogous rule automatically applies.

Finally, as discussed below, this holding is consistent with the positions that the IRS has taken in connection with the legal status of corporations following a statutory merger.

c. The IRS has consistently applied its rules to find that the parties to a statutory merger are the same following the merger.

I.R.C. § 368(a)(1)(A) provides that a statutory merger under state law is a form of reorganization recognized by the Code. The result of such a statutory merger is then defined by the Treasury regulations as follows:

> For purposes of section 368(a)(1)(A), a statutory merger or consolidation is a transaction effected pursuant to the statute or statutes necessary to effect the merger or consolidation, in which transaction, as a result of the operation of such statute or statutes, the following events occur simultaneously at the effective time of the transaction--
>
> (A) All of the assets (other than those distributed in the transaction) and liabilities (except to the extent such liabilities are satisfied or discharged in the transaction or are nonrecourse liabilities to which assets distributed in the transaction are subject) of each member of one or more combining units (each a transferor unit) become the assets and liabilities of one or more members of one other combining unit (the transferee unit); and
>
> (B) The combining entity of each transferor unit ceases its separate legal existence for all purposes; provided, however, that this requirement will be satisfied even if, under applicable law, after the effective time of the transaction, the combining entity of the transferor unit (or its officers, directors, or agents) may act or be acted against, or a member of the transferee unit (or its officers, directors, or agents) may act or be acted against in the name of the combining entity of the transferor unit, provided that such actions relate to assets or obligations of the combining entity of the transferor unit that arose, or relate to activities engaged in by such entity, prior to the effective time of the transaction,

> and such actions are not inconsistent with the requirements of paragraph (b)(1)(ii)(A) of this section.

Treas. Reg. § 1.368-2(b)(1)(ii). Thus, under these rules, the assets and liabilities of a pre-merger corporation become the assets and liabilities of a post-merger surviving corporation and the pre-merger corporations cease their separate legal existence.

The government argues that regardless of whether the acquiring corporation becomes liable for the acquired corporation's tax obligations, including interest owed on any tax, interest netting is not a tax itself but rather is a "tax attribute" and as a result does not necessarily transfer in a statutory merger. The government further argues that Congress has declined to include interest netting in I.R.C. § 381(a), which includes a list of tax attributes that transfer in a statutory merger. While the government concedes that the list is not exclusive, it nonetheless argues that Congress amended § 381 after the enactment of § 6621(d) and therefore has had ample opportunity to list interest netting as an attribute, thereby demonstrating an intent to exclude it from the attributes that transfer following a merger.

Plaintiff argues that the government's reliance on § 381 is not relevant. Plaintiff argues that interest netting is not a tax attribute but rather is an element of the tax itself. Specifically, plaintiff argues that interest is part of the tax and interest netting is a calculation of tax overpaid or underpaid and not a separate tax attribute. In support, plaintiff refers to I.R.C. § 6601(e)(1), which provides that interest "shall be assessed, collected, and paid in the same manner as taxes." Plaintiff argues that, if interest is treated as a tax, then netting, which is simply a calculation based on interest generated, is

also part of a tax. In response, the government argues that § 6601 is not controlling because it is a collection provision and not a general statement regarding the status of interest under the Code. Plaintiff disagrees, arguing that § 6601 provides definitions and a general overview of how interest functions within the Code, as evidenced by the provision's title: "Interest on underpayment, nonpayment, or extensions of time for payment, of tax." I.R.C. § 6601.

The court agrees with plaintiff and finds that § 6601 is a general statement regarding interest and is not limited to collections, as indicated by § 6601(a)'s "General rule," which expressly refers to the Code, stating:

> If <u>any amount of tax imposed by this title</u> (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the underpayment rate established under section 6621 shall be paid for the period from such last date to the date paid.

I.R.C. § 6601(a) (emphasis added). Thus, the court agrees with plaintiff that tax interest, including netting, is not a tax attribute limited by § 381(a).[11]

---

[11] Even if the court agreed that interest netting is a tax attribute, the fact that interest netting is not included on the § 381 list is not determinative because the legislative history on that provision makes clear that the list was not intended to be exhaustive. Specifically, the Conference Report states,

> [t]he section is not intended to affect the carryover treatment of an item or tax attribute not specified in the section or the carryover treatment of items or tax attributes in corporate transactions not described in subsection (a). No inference is to be drawn from the enactment of this section whether any item or tax attribute may be utilized by a successor or a predecessor corporation under existing law.

S. Rep. No. 83-1622, at 4915 (1954) (Conf. Rep.). Thus, the government's reliance on § 381 is misplaced.

Case 1:15-cv-00908-NBF Document 9-1 Filed 05/13/2015 Page 163 of

The court also finds that that the government's position regarding whether the parties to a statutory merger become the "same taxpayer" for tax purposes is not consistent with the few rulings by the IRS on the question of the tax liability of a surviving corporation for the tax of an acquired corporation following a merger. As discussed below, whenever the IRS has determined sameness in situations involving statutory mergers—as opposed to those involving consolidated groups—the IRS has found that the acquired corporation is the same taxpayer as the surviving corporation. Thus, when the IRS considered employment taxes under the Federal Unemployment Tax Act ("FUTA"), it concluded that "where a corporation is absorbed by another corporation in a statutory merger or consolidation the resultant corporation should be regarded as the same taxpayer and the same employer for [FUTA] purposes." Rev. Rul. 62-60, 1962-1 C.B. 186, 1962 WL 13492 at 1 (1962). A similar result was reached in a ruling involving excise taxes under § 5705(a). In Rev. Rul. 66-125, the IRS held that following a merger the surviving corporation was entitled to a refund when it removed relevant products from the market. 1966-1 C.B. 342, 1966 WL 15263 at 1 (1966). The IRS stated that the surviving corporation "should be considered the 'manufacturer' within the intent of [the provision] since that corporation is the successor to the manufacturing corporation and, therefore, is entitled to file claim for credit or refund . . . ." Id. In a third ruling, the IRS determined that an acquired corporation's income should be included along with the surviving corporation's income in applying a now-repealed provision. Rev. Rul. 72-356, 1972-2 C.B. 452, 1972 WL 29559 at 1 (1972). Finally, in Rev. Rul. 80-144, the IRS determined that the unused foreign tax credits of an acquired corporation could transfer

Case 1:15-cv-05908 Document 9 Page 164 Filed: 05/13/2015

over to the surviving corporation. 1980-23 I.R.B. 7, 1980-1 C.B. 80, 1980 WL 129701 at 1 (1980).

While none of these IRS rulings deal with interest netting, they demonstrate that the IRS has consistently treated the surviving corporation as the same taxpayer as the acquired corporation following a merger. Under this view, interest netting by merged corporations would be consistent with IRS revenue rulings to date. Indeed, as noted above, the IRS has previously allowed Wells Fargo to use interest netting in situations that are very similar to the ones at issue here. In 2010, the IRS permitted interest netting under § 6621(d) for three situations involving plaintiff that are nearly identical to the three scenarios here. See supra note 6. While the government contends that this determination was made prior to Energy East, and is therefore legally questionable, the court has determined that Energy East is not determinative of this case and therefore has no reason to believe that the IRS has changed its practice in the interim.

In fact, a review of several IRS internal memoranda prepared by individual IRS attorneys, referred to as Chief Counsel Advice ("CCA") and Field Service Advice ("FSA"), demonstrates that interest netting involving merged corporations was authorized. While this guidance is not precedential, even within the agency,[12] as in other cases, the court here finds that the guidance in these memoranda is helpful in determining the position of the IRS. See Rowan Cos. v. United States, 452 U.S. 247, 262 n.17 (1981)

[12] As a result, it appears that some memoranda may conflict with others, apparently without revoking the earlier guidance. As the court is merely treating these memoranda as informative of the IRS's approach to determining "same taxpayer" status, this does not affect the court's conclusion.

("Although these rulings have no precedential force, . . . they are evidence . . . ." (citations omitted)); Magma Power, 101 Fed. Cl. at 571-72.

In one FSA,[13] the IRS discussed whether the surviving corporation in a statutory merger could net interest between the overpayment of the acquired corporation and the underpayment of the acquiring corporation. The FSA concluded that, as a result of the merger, "[the acquiring corporation] assumed [the acquired corporation]'s liabilities," and therefore is entitled to net the overpayment against its own underpayment. I.R.S. Field Serv. Advice Mem. 200212028 (Mar. 22, 2002), 2002 WL 442928.[14] The FSA noted that "[i]t is important that [the acquiring corporation] assume [the acquired corporation]'s liabilities" and that the former would not be entitled to net interest if the latter continued to exist. Id. Of the two memoranda in which the corporations were not found to be the "same taxpayer," both involved subsidiaries and parent corporations, which, as the court found above with respect to Energy East and Magma Power, are factually distinct from the present case. I.R.S. Chief Counsel Advice 201225011 (June 22, 2012), 2012 WL 2361303; I.R.S. Chief Counsel Advice 201222001 (June 1, 2012), 2012 WL 1961411.[15] As a result, the court finds that IRS guidance is consistent with the

---

[13] The memorandum refers to itself as a CCA, but is titled as an FSA.

[14] The FSA also discussed whether § 6621(d) applies in eight other scenarios that are that are not relevant to this case, finding that it applied in one other scenario, did not apply in five, and was unresolved in the remaining two.

[15] As these memoranda were issued following Energy East, the government also argued that they demonstrated a reversal in the policy of the I.R.S. in applying § 6621(d). However, because the court has concluded that the corporate structures are legally and factually distinct, no such conclusion may be drawn.

plaintiff's view that mergers are distinct from other consolidated corporate relationships and that in the case of mergers, interest netting is allowed because the merged corporations are considered to be the same taxpayers for purposes of § 6621(d).

Finally, the court finds that IRS guidance under an analogous provision of the Code is also consistent with the court's conclusion that an acquired corporation is the "same taxpayer" as the surviving corporation following a statutory merger. Specifically, plaintiff notes that I.R.C. § 6402, which allows for offsetting tax underpayments with tax overpayments by a taxpayer, has consistently treated merged corporations as the "same taxpayer" for purposes of that section. Section 6402 provides:

> In the case of any overpayment, the [IRS], within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), (e), and (f) refund any balance to such person.

I.R.C. § 6402(a). The government argues that this provision is narrower than § 6621(d) in that it applies only to tax years that remain open and is purely discretionary on the part of the IRS.[16] However, in FSAs addressing the issue, the IRS has consistently allowed offsetting by the surviving corporation with overpayments made by an acquired entity. In addition, the IRS has recognized the similarities between § 6402 and § 6621(d). In one FSA, the IRS addressed a scenario in which a consolidated group with prior

[16] Additionally, the government argues that § 6402 does not by its terms expressly limit offsetting to payments by the "same taxpayer," making the IRS's determinations about it irrelevant for purposes of deciding this issue. While the provision is not expressly limited as § 6621(d) is, the court notes that they serve the same remedial purpose of making taxpayers whole and, as discussed above, are analogized to each other. For this reason, the court finds that IRS policies regarding the provision provide additional support for the court's conclusion.

overpayments was acquired by another consolidated group with outstanding tax liabilities, resulting in the parent and some subsidiaries in the acquired group being liquidated or otherwise ceasing to exist. I.R.S. Field Serv. Advice Mem. 200027026 (July 7, 2000), 2000 WL 33006060. Noting that Congress intended for § 6402 to be broadly construed, the FSA states that the acquired group's overpayment could be credited against the surviving group's liabilities. Id. In this connection, the FSA briefly discusses § 6621(d), stating that the hypothetical at issue lacked the specific facts to address whether consolidated groups that share some, but not all, members are the "same taxpayer" for purposes of that provision. The FSA then goes on to note that "the legislative history of section 6621(d) indicates that the zero interest rate applies in those circumstances where the Service would normally offset if the underpayments and overpayments were currently outstanding." Id. (citing H.R. Rep. No. 105-599, at 257 (1998) (Conf. Rep.)).

d. Wells Fargo is Entitled to Net Interest in Each of The Test Claims.

The court thus concludes that merged corporations are the "same taxpayer" for purposes of § 6621(d) based on the undisputed principles of corporate law, as well as IRS rules governing statutory mergers and IRS guidance. Thus, for each of the three scenarios presented in this case, interest netting will be allowed.

i. Scenario One

Under this fact pattern, plaintiff proposes to net underpayment interest on First Union's 1999 income tax account against overpayment interest on Old Wachovia's 1993 income tax account. Specifically, plaintiff seeks to net interest for the periods from

March 15, 2000 to December 26, 2001 and from January 25, 2002 to March 15, 2004. Thus, plaintiff seeks to net interest between the pre-merger acquired corporation and the pre-merger acquiring corporation. Contrary to the government's contention, the court finds that this scenario is not controlled by <u>Energy East</u> because this scenario involves interest netting in connection with merged corporations rather than consolidated groups. Old Wachovia merged with First Union in 2001, and became one and the same with First Union (now Wells Fargo) on the date of that merger, after which the surviving corporation shared the past of both the acquired and acquiring corporations. Accordingly, based on the authorities discussed above, the court finds that Old Wachovia and First Union became the "same taxpayer" by operation of law and thus interest netting is allowed.

ii. Scenario Two

Under this fact pattern, plaintiff seeks to net underpayment interest on First Union's 1999 income tax account against overpayment interest on First Union's 1993 income tax account, representing a pre-merger acquiring corporation and the post-merger surviving corporation. Specifically, plaintiff seeks to net interest on the periods from January 25, 2002 to March 15, 2002. For the same reasons as the court has discussed above, the fact that the underpayment may have arisen from income generated by corporations that merged into First Union after 1993 is irrelevant. Following the merger, those corporations became one with First Union. The court therefore finds that interest netting is allowed in this scenario.

iii. Scenario Three

Under this fact pattern, plaintiff seeks to net underpayment interest on First Union's 1999 income tax account against overpayment interest on CoreStates's 1992 income tax account, representing a pre-merger acquired corporation and a post-merger surviving corporation. Specifically, plaintiff seeks to net interest on the period from March 15, 2000 to March 15, 2002. Based on the same reasoning discussed above, the court finds that the entities became the "same taxpayer" by operation of law through the statutory merger and thus the court finds that interest netting is allowed.

IV. CONCLUSION

For the reasons set forth above, plaintiff's motion for partial summary judgment is **GRANTED** and the government's cross-motion for partial summary judgment is **DENIED**.

Pursuant to 28 U.S.C. § 1292(d)(2), the court certifies that the interpretation of § 6621(d) presents a controlling question of law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from this order with regard to that question may materially advance the ultimate termination of this litigation. All proceedings in this matter are stayed until further order of the court.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

WELLS FARGO & COMPANY,
Plaintiff-Respondent,

v.

UNITED STATES,
Defendant-Petitioner.

2015-103

On Petition for Permission to Appeal pursuant to 28 U.S.C. Section 1292(d)(2) from the United States Court of Federal Claims in No. 1:11-cv-00808-NBF, Judge Nancy B. Firestone.

ON MOTION

Before O'MALLEY, WALLACH, and HUGHES, *Circuit Judges*.

HUGHES, *Circuit Judge*.

O R D E R

The United States petitions for permission to appeal the United States Court of Federal Claims order granting Wells Fargo & Company's motion for partial summary

judgment and denying the government's motion for partial summary judgment.

Pursuant to 28 U.S.C. § 1292(d)(2), the trial court certified the interpretation of I.R.C. § 6621(d) for interlocutory review. Section 6621 of the Internal Revenue Code states in relevant part:

> To the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer of tax imposed by this title, the net rate of interest under this section on such amounts shall be zero for such period.

I.R.C. § 6621(d). At issue is the determination of whether merged entities constitute the "same taxpayer."

Under 28 U.S.C. § 1292(d)(2), this court "may, in its discretion, permit an appeal to be taken from" an order of the trial court that "includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation."[1]

The interpretation of the phrase "same taxpayer" in I.R.C. § 6621(d) is a pure legal question. Additionally, the government argues that there is a substantial ground for difference of opinion, asserting that the trial court's interpretation cannot be reconciled with some of this court's previous decisions. Finally, interpreting "same

---

[1] Section 1292(d)(2) is the Court of Federal Claims counterpart to section 1292(b), which permits interlocutory appeals of district court orders under the same parameters.

taxpayer" at this stage in the litigation may advance the ultimate termination of the litigation, as the parties will be able to resolve the computational issues surrounding the thousands of netting transactions asserted by Wells Fargo on their first effort.

This court determines for itself whether it will grant permission to appeal an interlocutory order certified by a trial court. *See In re Convertible Rowing Exerciser Patent Litigation*, 903 F.2d 822, 822 (Fed. Cir. 1990). Such a ruling is within this court's discretion. *Id*. In this case, the circumstances warrant granting the petition.

Accordingly,

IT IS ORDERED THAT:

The petition for permission to appeal is granted.

FOR THE COURT

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court

s25

CERTIFICATE OF SERVICE

I hereby certify that the foregoing corrected brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on May 13, 2015, and that all counsel for the appellee are CM/ECF users and will be served by the CM/ECF system.

/s/ ELLEN PAGE DELSOLE
ELLEN PAGE DELSOLE
Attorney

CERTIFICATE OF COMPLIANCE

With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   [X] this brief contains 13,389 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook; *or*

   [ ] this brief has been prepared in a monospace typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s) /s/ Ellen Page DelSole
Attorney for United States
Dated: May 13, 2015